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THE LAW

OF THE

SUSPENSION

OF THE

POWER OF ALIENATION

IN THE

STATE OF NEW YORK.

BY

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TO MY

FRIEND AND CLASSMATE,

GEORGE W. VAN SLYCK,

This Work

IS RESPECTFULLY DEDICATED.

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THE SUSPENSION OF THE POWER OF ALIENATION.

CHAPTER I.

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1. By the English law[1], which prevailed in New York before the adoption of the revised statutes, the alienation of property could be suspended for any number of persons who were alive at the beginning of the suspensory period.[2] The revisers, whose consummate ability was glorified with a zeal for improving the law worthy of enduring honor, recommended the narrowing of this period to two lives,

[1] For history of alienation in Great Britain see opinion of Savage, Ch. J., in Coster *v.* Lorillard, 14 Wend. 294–296.

[2] Coster *v.* Lorillard, 14 Wend. 299.

save one exception. Their recommendation, though adopted, lost something in preciseness of form by legislative amendment,[1]—another example of the daring of persons through insufficiency of knowledge.

2. The power to alienate real and personal property "is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."[2] This is the sole test of an unlawful perpetuity.[3] In other language, when persons can convey an absolute estate or interest in property, the power of alienation exists and may be exercised like any other power.[4]

3. Nor will their inability to give immediate possession suspend their power of alienation. Though not having possession, if their estate or interest is vested, it can be conveyed. Thus, in Gott *v.* Cook,[5] the trustee was directed to distribute the principal of the trust fund among the children of the trust-maker's niece when the youngest became twenty-one. At her death they acquired a vested interest in the principal, and they, or their guardians, by joining with those who had an interest in the subsequent income of the estate, could immediately con-

[1] The original form of the statute was: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance, and until the termination of a life or lives in being at the creation of the estate." See remarks of Nelson, Ch. J., in Hawley *v.* James, 16 Wend. 129, and of Savage, Ch. J., in Coster *v.* Lorillard, 14 Id. 306, 307.

[2] R. S. Part II, Ch. 1, Tit. 2, § 14.

[3] Robert *v.* Corning, 89 N. Y. 225, 235. "The general test of alienability is that there are persons in being who can make a perfect title." Andrews, J., Genet *v.* Hunt, 113 N. Y. 172.

[4] Norris *v.* Beyea, 13 N. Y. 289. "It is manifest that where there are persons in being at the creation of an estate, capable of carrying an immediate and absolute fee in possession, there is no suspension of the power of alienation, and no question under the statute of perpetuities arises." Andrews, J., Robert *v.* Corning, 89 N. Y. 235; Murray *v.* Murray, 7 N. Y. State Rep. 391.

[5] 7 Paige, 521, affd. 24 Wend. 641. See Nellis *v.* Nellis, 99 N. Y. 516.

vey an absolute ownership or fee in the whole fund. In Casey *v.* Buttolph [1] a father conveyed his farm in fee to his sons, but reserved the possession during his life; yet the reservation of the possession did not invalidate the conveyance.[2] In another case a testator devised one share of his real estate to a husband in trust for his wife during her life, and to her heirs subject to his life estate after her death. Her title having vested immediately, and not in the trustee during her life, no suspense in alienation was created.[3] As a final illustration, a testator devised to his wife, in lieu of dower, the use and income of land for life which, after her death, was to be a residuary estate. No trust having been created during her life, she had an absolute right to dispose of her interest, and consequently her power of alienation was not suspended.[4] This principle, that the alienability of property is not suspended when the interest therein is vested, though unaccompanied with possession, has been uniformly maintained.[5]

4. The question may be repeated, which was asked in

[1] 12 Barb. 637.

[2] The court cited, Gott *v.* Cook, 7 Paige, 521; Jackson *v.* McKenny, 3 Wend. 233; Tooley *v.* Dibble, 2 Hill, 641; Goodell *v.* Pierce, Id. 659.

[3] Noble *v.* Cromwell, 26 Barb. 475.

[4] Bailey *v.* Bailey, 97 N. Y. 460.

[5] "Nobody ever doubted that a remainder which was vested in interest could be transferred both in law and in equity. Again, the revised statutes have declared in express terms that expectant estates are descendible, devisable and alienable in the same manner as estates in possession (1 R. S. 725, § 35). And by an examination of the several provisions of the revised statutes it will be seen that, by the term 'expectant estates,' the legislature intended to include every present right or interest, either vested or contingent, which may by possibility vest in possession at a future day. The mooted question, whether a mere possiblity coupled with an interest is capable of being conveyed or assigned at law is therefore put at rest in this state. Besides, there never was a doubt that any interest, whether in personal property or a mere possibility coupled with an interest in real estate, was assignable in equity." Chancellor Walworth in Lawrence *v.* Bayard, 7 Paige 70, 75, citing Whitfield *v.* Fausset, 1 Ves. Sr. 391; Wright *v.* Wright, Id. 411; Orphan Asylum *v.* White, 6 Dem. 201.

the early administration of the law, suppose a piece of land is exchanged for another, or sold for the purpose of changing the investment, is the power to alienate the land suspended within the meaning of the statute? The courts have always answered that the newly-acquired property is no less under the ban of suspension than the property sold or exchanged. The power of substitution does not preserve or reanimate the power of alienation.[1]

5. By common law the power of alienation could be suspended only by creating contingent future estates. These were executory devises or contingent remainders. In such cases, so Justice Denio has remarked, as the ultimate vesting of an estate was unknown, no person could convey the absolute fee.[2] By statute, the power to alienate present estates may be suspended.

6. By statute future estates are declared to be "either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the immediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain."[3]

7. "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed" in the following section of the revised statutes. "The absolute power of alienation shall not be suspended, by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the

[1] Hawley v. James, 16 Wend. 164, S. C. 5 Paige, 445; Brewer v. Brewer, 11 Hun, 147, 152; Williams v. Williams, 8 N. Y 532. See Belmont v. O'Brien, 12 Id. 394, 405; Van Vechten v. Van Veghten, 8 Paige, 124; Robert v. Corning, 89 N. Y. 236, § 70.

[2] Leonard v. Burr, 18 N. Y. 107.

[3] R. S. Part II, Ch. 1, Tit. 2, § 13. This is the fourth class of contingent remainders mentioned by Fearne.

creation of the estate."[1] To this rule one exception has been established. "A contingent remainder-in-fee may be created on a prior remainder-in-fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain their full age."[2]

8. Perhaps some of the terms employed in this statute ought to be explained before going further. A remainder-in-fee is an immediate right to the possession of land as soon as the precedent estate is determined.[3] Thus, if land is given to A. for life, and after his death to B., the latter has a remainder-in-fee of which he comes into possession on A.'s death. If land is given to A. for life, and after his death to B., and, if he should die before attaining the age of twenty-one, to C., then C. would have a contingent remainder-in-fee;[4] and in the event of B.'s death before reaching the stipulated age, C. would become the possessor of the property.[5]

9. By these statutes, therefore, the period of suspension is limited to two lives in being at the time of creating the estate, and also the minority of the child to whom the remainder-in-fee is first limited. And by minority is meant not an absolute term of twenty-one years, but the life of a minor.[6] The suspension may be for a shorter

[1] R. S. Part II, Ch. 1. Tit. 2, §§ 14, 15. [2] Id. § 16.

[3] "A vested or executed remainder at common law, is one where a present interest passes to the party to be enjoyed in future, and by which the estate is invariably fixed to remain in a designated person after the particular estate is spent." Nelson, Ch. J., in Hawley *v.* James, 16 Wend. 137.

[4] A remainder is contingent while the person to whom, or the event upon which it is limited to take effect is uncertain. R. S. Part II, Ch. 1, Tit. 2, § 13.

[5] Hawley *v.* James, 16 Wend. 123, 137.

[6] Rapallo, J., has remarked: "The revisers, by means of that section, intended to adopt the English limit of suspension, viz., lives in being and twenty-one years afterward, with a modification reducing the lives to two

period than life, a minority for example, but not for a fixed period. This was decided in the early days of the law. No period of time, however short, will satisfy the statute. By disregarding this principle and fixing a definite period, testators have opened a grave for the burial of their own trusts or other suspended estates.[1]

10. The law relates only to the *power* of alienation, and not to the time of its *actual exercise*. Consequently, an unlawful perpetuity is not created unless the power to sell has been suspended.[2] If, therefore, a trust is created for the sale and distribution of property, though no time is fixed for executing it, and the trustees, pending the sale, are empowered to receive the income for the beneficiaries, the inalienability of their interest, during the existence of the trust, will not suspend the power of alienation, because the trustees at any time can convey an absolute fee in possession.[3]

11. The law applies to every kind of conveyance. In

and providing that the twenty-one years, instead of being an absolute term, must depend upon the continuance of the minority of the person to whom the defeasible remainder-in-fee is limited." Manice *v.* Manice, 43 N. Y. 375; Andrew *v.* N. Y. Bible and Prayer Book Society, 4 Sand. 177. See also Jennings *v.* Jennings, 7 N. Y. 548; Amory *v.* Lord, 9 Id. 417-419; Savage *v.* Burnham, 17 Id. 561; Downing *v.* Marshall, 23 Id. 366; Knox *v.* Jones, 47 Id. 389; Coster *v.* Lorillard, 14 Wend. 265; Hone *v.* Van Schaick, 7 Paige, 231; Robert *v.* Corning, 89 N. Y. 235. Says Nelson, Ch. J., "Taking the two sections together, and they are so to be construed, they permit a limitation for two lives in being, and twenty-one years in addition in case of actual minority—for example, an estate to A. for life, remainder to his children in fee; but in case such children shall die under the age of twenty-one years, then to B. in fee. Here the ownership may be suspended for the life of A., and the actual infancy of his children, but in no event can exceed that length of time. If one of the children reach twenty-one years, B.'s remainder is void." Hawley *v.* James, 16 Wend. 123.

[1] Hawley *v.* James, 16 Wend. 16, 121.

[2] Robert *v.* Corning, 89 N. Y. 225.

[3] Id.; Radley *v.* Kuhn, 97 Id. 26; Riker *v.* Society of the N. Y. Hospital, 66 How. Pr. 246; Murray *v.* Murray, 7 N. Y. State Rep. 391; Haxtun *v.* Corse, 2 Barb. Ch. 506, 519. See § 69.

the language of Justice Wright: "The law against the suspense of alienation of real or personal property is applicable to every species of conveyance and limitation, whether it be by deed or will; whether it be directly to a party competent to hold property, or indirectly in trust or to the use of such party, or to one hereafter to come into existence; and whether limited by an executory devise, or a springing use, and whether in the form of a power in trust, or of a legal express trust." [1]

[1] Yates *v.* Yates, 9 Barb. 347.

CHAPTER II.

EXPRESS TRUSTS FOR RECEIVING AND APPLYING INCOME.

SECTION I.

HOW SUSPENSION IS EFFECTED.

12. Before the enactment of the statute a suspension was effected only by creating a contingent future estate. As the alienation of land can now be suspended by creating a present trust-term or estate,[1] the statute has created a new mode of suspending the alienation of property. It has been a prolific mother of litigation, and after sixty years of gestation shows hardly a sign of exhaustion. This, however, must not be regarded as an ad-

[1] See remarks of Denio, Ch. J., in Everitt *v.* Everitt, 29 N. Y. 79; of Nelson, Ch. J., in Hawley *v.* James, 16 Wend. 121; of Finch, J., in Smith. *v.* Edwards, 88 N. Y. 102

verse criticism on the statute, for the parties who have fought over it would probably have fought just as strenuously over any other law applying to their rights and interests.

13. This statutory trust can be created for only two purposes, one of which is "to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the first article" of the second title of the chapter relating to real property. The other purpose is "to receive the rents and profits of lands, and to accumulate the same," for minors.[1]

14. The language of the original statute setting forth the purpose of the first-mentioned trust was more specific, for in the place of the word "use" stood the words "education and support, or either." This enlargement of the scope of the trust was done in 1830.[2]

15. An express trust[3] may be recognized by the following characteristics: (1) It is created for receiving and applying the income of real estate; (2) the title to the trust property is vested in the trustee; (3) he cannot sell it; (4) the beneficiary cannot sell or assign his interest therein; (5) the duration of the trust is measured by lives or by a shorter period than the specified lives, for example, during minority or widowhood;[4] (6) a trust is rarely express which can be executed as a power. Indeed, the opinion has been ventured by an eminent jurist without qualifica-

[1] R. S. Part II, Ch. 1, Tit. 2, § 55.

[2] Laws of 1830, Ch. 320, § 10. The object of the amendment was fully explained by Chancellor Walworth in Gott *v.* Cook, 7 Paige, 537

[3] To constitute an ordinary trust three things are needful, (1) sufficient words to raise it; (2) a definite subject; (3) a certain or ascertained object. Story's Eq., § 964; Cruwys *v.* Colman, 9 Ves. 323.

[4] The trust may be limited on some event beside life, only life must in some form enter into the limitation. Bronson, J., in Hawley *v.* James, 16 Wend. 61, 172.

tion that a trust cannot be express which can be executed as a power.[1] The five elements or characteristics first mentioned are always present in an express trust; by these its nature may be determined.

16. Though the effect of an express trust is to suspend the power of alienation, it was not established for that purpose. The effect is a consequence, and not the purpose of establishing it. So it has been contended that an express trust may exist which does not work a suspension of the power, for example, the collection of rents and profits and the application of them to the use of the beneficiary.[2] But in this contention there was left out of sight the vesting of the title to the trust property in the trustee, the measuring of the trust-period by lives, and other indispensable characteristics of an express trust. In the cases cited to sustain the contention the title was not thus vested, and, therefore, though the trustee collected the rents and profits and paid them over, no express trust existed. The case of Tucker *v.* Tucker[3] may be recalled for an illustration. The testator devised some houses to his children and grandchildren, but directed that they should not come into possession of them until one year after the death or marriage of his widow; in the meantime the executors were to rent, repair and insure them, collect the rents and divide the surplus income among the children. Yet the testator created no express trust, but only a power in trust for the title to the houses vested in the children. All of the cases reviewed in the contention above noticed were either simply powers in trust, or these co-existed with express trusts; and whenever a trust is thus constituted with a double nature, alienation may be effected by exercising the power in trust. But both are never active during the same moment of time;

[1] See §§ 46–52. [2] See § 52. [3] 5 N. Y. 408.

either the express trust is active and working a suspension of the power of alienation; or the power in trust is active, whereby the power of alienation is continued or revived. Powers in trust are constantly created to sell and distribute property, and before effecting this object an income is received therefrom, but no express trust is implied by thus receiving and paying over the income to those who are entitled to the same, for this is merely incidental to the sale or distribution of the property; and, for the more conclusive reasons that the trustee has no title thereto, and its duration is not bounded by specified lives. All of the characteristics above mentioned are essential to create an express trust, the receiving and application of the income by the trustee, the vesting of the estate in him, the unlawfulness of a disposition thereof by him, or by the beneficiary, and the proper life-duration of the trust. When *either* of these characteristics is lacking an express trust does not exist.[1] As an express trust does have the effect of suspending the power of alienation,[2] the presence or absence of this power furnishes a test to determine the existence of such a trust. For, whatever be the nature of the trust, if the power of alienation is not thereby suspended, if either the trustee or beneficiary, or both, can convey the trust property, the trust is not express.

17. Though this statute is confined to trusts in real estate,[3] trusts in personal property may be created;[4] and of

[1] But see remarks of Hogeboom, J., in Fellows *v.* Heermans, 4 Lans. 234.

[2] Belmont *v.* O'Brien, 12 N. Y. 401; Wood *v.* Wood, 5 Paige, 600; Hawley *v.* James, 16 Wend. 61; Coster *v.* Lorillard, 14 Id. 265; Kane *v.* Gott, 24 Id. 641; Irving *v.* De Kay, 9 Paige, 521, affd. 5 Denio, 646; Van Epps *v.* Van Epps, 9 Paige, 237.

[3] Kane *v.* Gott, 24 Wend. 641; Graff *v.* Bonnett, 31 N. Y. 9; Cutting *v.* Cutting, 86 Id. 545.

[4] R. S. Part II, Ch. IV, Tit. 4, §§ 1, 2; Gilman *v.* Reddington, 24 N. Y. 12; Gott *v.* Cook, 7 Paige, 521, affd. 24 Wend. 641; Leggett *v.* Perkins, 2 N. Y. 297; Savage *v.* Burnham, 17 Id. 561; Brown *v.* Harris, 25 Barb. 134; Van

late years the courts have been lifting them nearly to the same plane as express trusts. The truth of this remark will more fully appear in another chapter.

18. How does the creating of such a trust effect a suspension? By the sixty-fifth section of the same chapter and title, when a trust is expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustee in contravention of the trust is utterly void.[1] He, therefore, can convey nothing contrary to the terms of the instrument. By the sixty-third section of the same title, the beneficiaries who are interested in a trust for the receipt of the rents and profits of land cannot assign or in any manner dispose of their interest; and by the sixtieth section every express trust, except as otherwise provided, vests the whole estate in the trustee, so that the persons for whose benefit it is created take no estate or interest in the land which they can convey. Consequently, the suspension of alienation, whenever an express trust exists, is doubly effected—first, by absolutely prohibiting the trustee from selling; and, secondly, by withholding the estate from the beneficiaries.[2]

19. The three most prominent elements that are seen in

Vechten *v.* Van Veghten, 8 Paige, 104; De Peyster *v.* Clendining, Id. 295; Everitt *v.* Everitt, 29 N. Y. 39; Graff *v.* Bonnett, 31 Id. 13, 19; Genet *v.* Hunt, 113 Id. 166; Bean *v.* Bowen, 47 How. Pr. 306.

[1] Fitzgerald *v.* Topping, 48 N. Y. 438, 444. The trustee can now sell the land in some cases. Laws of 1886, Ch. 257; Matter of Roe, 119 N. Y. 509.

[2] See remarks of Savage, Ch. J., in Coster *v.* Lorillard, 14 Wend. 302-305, and of Denio, Ch. J., in Everitt *v.* Everitt, 29 N. Y. 71, and of Taggart, J., in Amory *v.* Lord, 9 Id. 416, 417; Hawley *v.* James, 16 Wend. 160-166; Belmont *v.* O'Brien, 12 N. Y. 401. "Under our statute of uses and trusts, when the trust is created by will, two things are necessary to vest an estate in the trustee; it must be an express trust, and a trust to receive the rents and profits of lands for certain specified purposes. Such a trust, when legally created, suspends the power of alienation, and vests the whole estate in the trustee. But no other trust, though expressly declared, prevents the estate from descending to the heir-at-law, or passing to the devisee." Bronson, Ch. J., Boynton *v.* Hoyt, 1 Denio, 57.

a trust from the present point of view are: (1) The title vested in the trustee; (2) his inability, nevertheless, to sell the trust estate; (3) and a similar inability on the part of the beneficiary. So long as these elements are present the completeness of the suspension wrought by them is apparent. Even though the legal and equitable title to the estate be vested in the trustee, a sale in contravention of the trust would be void;[1] he cannot even make necessary repairs unless they are authorized by the trust.[2]

20. Looking at the beneficiary, even though he should be the remainder-man, he cannot alienate the land during the trust period. Thus in Gilman *v.* Reddington[3] the beneficiaries of the trust, who were children of the testator, were to have the income of the estate until the two youngest children were thirty years old, if they lived so long, and after that they were to have the fee. Chief Justice Comstock, after remarking that the estate was given entirely, and for life, to the three children of the testator, continued: "The limitation, it is true, is of a future estate, to take effect in possession at the end of the trust term. Until then the title is wholly in the trustees: I mean wholly during the term and as a temporary estate. But the future estate or remainder is in fee, and it is vested in interest at the death of the testator, wholly in the three children."[4] A trust then is indestructible during the

[1] R. S. Part II, Ch. I, Tit. 2, § 65.

[2] L'Amoureaux *v.* Rensselaer, 1 Barb. Ch. 34, 37.

[3] 24 N. Y. 9, 15.

[4] "According to the statute (1 R. S. p. 723, 13), a future estate is vested when there is a person in being who would have an immediate right of possession on the ceasing of the intermediate or precedent estate. The three children were in being at the death of the testator and by the very terms of the devise would be entitled to the possession and enjoyment of the estate, at the expiration of the trust. It was, therefore, a present and vested devise of a future estate." Id.

period for which it was created even with the consent of all the trustees and beneficaries.[1]

21. When such a trust exists the beneficiary cannot assign, sell, pledge, or in any manner dispose of his interest in the trust property, or in the income; nor can he contract a debt that will raise a lien on the income whereby it can be reached by a creditor.[2] He cannot charge the property with repairs without the trustee's assent;[3] the only thing he can do is to enforce the performance of the trust.[4]

22. Furthermore, the rule applies to married women as well as to others. They can neither pledge nor create charges on the income of the trust property that may accrue or become payable to them. As Justice Comstock has remarked, taking no estate or interest they have nothing to dispose of, neither absolutely by a sale, or contingently by a change which may result in a sale.[5] And should a surplus income accrue not needed for their support, even this cannot be reached except for a debt contracted before marriage.[6] But the surplus income of any other beneficiary can be reached by a creditor.[7]

[1] Douglas *v.* Cruger, 80 N. Y. 15; Penfield *v.* Lower, 46 N. W. Rep. 413. The law on the subject of suspension in North Dakota is similar to the law of New York.

[2] R. S. Part II, Ch. I, Tit. 2, § 63; L'Amoureaux *v.* Van Rensselaer, 1 Barb. Ch. 34.

[3] Id.; Noyes *v.* Blakeman, 6 N. Y. 567.

[4] R. S. Part II, Ch. I, Tit. 2, § 60; L'Amoureaux *v.* Van Rensselaer, 1 Barb. Ch. 34. But see Grout *v.* Van Schoonhoven, 1 Sand. Ch. 336.

[5] Yale *v.* Dederer, 18 N. Y. 267; L'Amoureaux *v.* Van Rensselaer, 1 Barb. Ch. 37; Noyes *v.* Blakeman, 3 Sand. 531.

[6] L'Amoureaux *v.* Van Rensselaer, 1 Barb. Ch. 34.

[7] See § 216.

SECTION II.

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69. The non-exercise of a power which exists does not cause a suspension.
70. An excessive trust-term cannot be mended by uniting a power of sale if the proceeds are to be held like the original property.

23. Having shown when the power of alienating real estate is suspended, and how this is rendered effective by creating an express trust, we will briefly describe some of the characteristics pertaining to the form of such a trust. And we may begin by stating negatively that the trust need not be expressed in the precise words of the statute.[1] In the early days of administering the law the question was raised whether, in constituting a trust, the words of the statute to receive the rents and profits and apply them to the use of the beneficiary must be strictly followed; or whether an authority or direction to the trustee to pay over the rents and profits to the beneficiary was an adequate compliance.[2] Vice Chancellor McCoun declared that whenever a trust was clearly within the statute in object and design in other respects, the use of either expression, "to apply to the use of, or to pay over," would suffice. "The latter direction may be one mode of accomplishing and fulfilling the words of the statute in a proper case and under particular circumstances of which the court must judge."[3]

24. The trust, however, must be in writing in order to satisfy the statute of frauds.[4] This point has been fully

[1] Shepard *v.* Gassner, 41 Hun, 326; Phillips *v.* Davies, 92 N. Y. 199; Beekman *v.* Bonsor, 23 Id. 298, 314. See Matteson *v.* Armstrong, 11 Hun, 245.
[2] Coster *v.* Lorillard, 14 Wend. 265; Hawley *v.* James, 16 Id. 61, 157.
[3] Craig *v.* Hone, 2 Edw. Ch. 554, 563. See §§ 38–41.
[4] Smith *v.* Matthews, 3 De Gex, F. & J. 139.

considered by Justice Folger.[1] Under a statute very like this in its provisions it was held, that "the trust must appear in writing with absolute certainty as to its nature and terms, before the court can undertake to execute it. A trust must be manifested and proved by writing, and the nature of the trust, and the terms and conditions of it must sufficiently appear, so that the court may not be called upon to execute the trust in a manner different from that intended."[2]

25. No particular words though are needful to create a trust. Says Justice Andrews: "It is not essential that the words 'trust' or 'trustee' should be used, or that there should be a direct devise in terms to the trustee, or that the authority to receive the rents and profits should be conferred in express language. It is sufficient if the intention to create a trust under the statute can be fairly collected from the instrument, and what is implied from the language used is, as in other instruments, deemed to be expressed."[3] A testator, therefore, who gave to his wife, for her sole use during life, one-half of the income of his property besides the use and occupation of his two residences, and the remainder of the income to his heirs during the life of his wife, created a trust.[4] In Bean *v.* Bowen[5] executors were directed to convert real estate

[1] Dillaye *v.* Greenough, 45 N. Y. 445.

[2] See Steere *v.* Steere, 5 Johns. Ch. 1.

[3] Morse *v.* Morse, 85 N. Y. 53, 60; Donovan *v.* Van De Mark, 78 Id. 244; Savage *v.* Burnham, 17 Id. 561; Heermans *v.* Robertson, 64 Id. 332, affg. 3 Hun, 464; Heermans *v.* Burt, 78 N. Y. 259; Leggett *v.* Perkins, 2 Id. 297; Vernon *v.* Vernon, 53 Id. 351; Robert *v.* Corning, 89 Id. 225, affg. 23 Hun, 299; Ward *v.* Ward, 105 N. Y. 68; Bradley *v.* Amidon, 10 Paige, 235; Tobias *v.* Ketchum, 32 N. Y. 319; Wright *v.* Douglass, 7 Id. 564, reversing 10 Barb. 97. "No particular form of words is necessary to create a trust. Any language clearly showing the intention of the testator will have that effect." Vann, J., in Hathaway *v.* Hathaway, 37 Hun, 267, citing Brewster *v.* Striker, 2 N. Y. 19. See Delafield *v.* Barlow, 107 Id. 535.

[4] Woodward *v.* James, 115 N. Y. 346. [5] 47 How. Pr. 306, 327.

into money and to invest it for five years, for the purpose of accumulation. At the end of that period they were to pay some legatees and to divide the residue among others. A trust existed in this case. "The executors," said Justice Morgan, "necessarily took the legal title and the right to the possession of the property, if the directions of the testator can be sustained according to his manifest intention. Even as to real estate, courts have implied an estate in the executors as trustees although no estate was given to them in words."[1] So, language like the following: "I give, devise, and bequeath to A. all my estate in trust nevertheless for the necessary support and maintenance of my son B. during his natural life and after his death I give and bequeath the said estate to B.'s children," plainly marks the testator's intention to create a trust, and to vest the estate in the trustee.[2] But if a trust-maker should direct that his property must "remain under the control of" his executor, the language would be too vague to create a valid trust.[3] In another case a trust-maker directed that on the death of A. the trustees should hold one-half of the premises granted for the use of B. and his heirs, and the other half for the use of C. D. and E. and their heirs and assigns subject to some charges. If any of these persons died before the grantor then their portion was to go to their lawful issue, but if they had none then to the right heirs of the grantor. This trust was void for uncertainty.[4]

26. The question is not always easy to answer whether an express trust has been created or not. In Vernon *v.* Vernon[5] the testator gave some land to his wife, but his

[1] See also Williams *v.* Conrad, 30 Barb. 524.

[2] Donovan *v.* Van De Mark, 78 N. Y. 244. See Verdin *v.* Slocum, 71 Id. 345.

[3] Aldrich *v.* Funk, 48 Hun, 367, 375; Chamberlain *v.* Taylor, 105 N. Y. 182, 191. See § 47 for fuller description of a power in trust.

[4] Jarvis *v.* Babcock, 5 Barb. 139. [5] 53 N. Y. 351.

executors were also authorized to sell the same for a specified price, and to invest the proceeds for her benefit during her life. It was contended that the testator intended to create an express trust, but the court maintained that the trustees had no title to the land, but only a power to sell it. The title, therefore, was vested in the wife in fee, or for life, subject to the execution of the power of sale given to the executors.[1] By another provision in the same will, the testator gave an annuity to his wife which was to be paid from the testator's share of the rent of stores. The executors were also authorized to sell them at a specified price. The court maintained that the intention of the testator was plain, that the executors were to take the legal title to these and to receive the income therefrom. The trust was, in legal effect, said Justice Andrews, "to receive the rents and profits of the lands, and apply them to the payment of the annuity during the life of the annuitant, coupled with a power to sell the property."

27. In Haxtun *v.* Corse[2] the testator directed that the income from one-fourth of his estate should be applied, at the discretion of the executors, toward the support of his son and his family during his life and the education of his children, and that after his death the principal and unexpended income should be divided among them. Though an express trust was not created in terms, this was the evident intention of the testator; and the validity of the intention was clearly within the statute.

28. In Bliven *v.* Seymour[3] a testator gave to each of his daughters the use of a thousand dollars and directed the principal to go to their children respectively. The testator also expressed the "wish" that the one thousand dollars devised to his daughter A., if she died leaving

[1] R. S. Part II, Ch. I, Tit. 2, §§ 56, 59; Boynton *v.* Hoyt, 1 Denio, 53.
[2] 2 Barb. Ch. 506.
[3] 88 N. Y. 469, 477.

no child, should go to E.'s children. But if "A. died leaving child or children, then the child or children are to have the use, and when the youngest shall come to his or her majority that then the same is to be paid over to said child or children." An express trust was not created by the testator. Said Justice Finch: "No attempt to create one has been made; there is not even an express gift to the executors. Nothing whatever is required of them which they may not do as executors, and by virtue of the power impliedly conferred. They hold as executors merely, performing their duty as such without taking a trust estate."[1]

29. A trust, too, may be implied whenever the intention is apparent from the language employed in the will or other instrument. In Marx *v.* McGlynn[2] the testatrix directed her executor to pay to B. during his life the income from her estate, and endowed him with authority to sell and convey any portion of it. Though this created no direct or express devise of the estate to the executor in trust, "it must be implied," said the court, "that the testatrix intended that he should take the title of the estate in order that he could manage and control the same, and carry out the trust intended."[3]

[1] Citing Gilman *v.* Reddington, 24 N. Y. 18; Williams *v.* Conrad, 30 Barb. 524; Martin *v.* Martin, 43 Id. 172; Burke *v.* Valentine, 52 Id. 412; Everitt *v.* Everitt, 29 N. Y. 72; Tucker *v.* Tucker, 5 Id. 408; Smith *v.* Edwards, 88 Id. 92.

[2] 88 N. Y. 357, 375.

[3] Betts *v.* Betts, 4 Abb. N. C. 317, 385; Vail *v.* Vail, 7 Barb. 226: Leggett *v.* Perkins, 2 N. Y. 297; Vail *v.* Vail, 4 Paige, 317, 328; Bradley *v.* Amidon, 10 Id. 235; Craig *v.* Craig, 3 Barb. Ch. 76; Manice *v.* Manice, 43 N. Y. 303; Downing *v.* Marshall, 23 Id. 378; Gott *v.* Cook, 7 Paige, 521; Brewster *v.* Striker, 2 N. Y. 19, 30, 36; Verdin *v.* Slocum, 71 Id. 345; Jarvis *v.* Babcock, 5 Barb. 139, 140, 144; Beekman *v.* Bonsor, 23 N. Y. 298, 314; Noyes *v.* Blakeman, 6 Id. 567, 577, 579. In Tobias *v* Ketchum, 32 Id. 319, 330, Davis, J. said, "The authority to rent and lease, to repair and insure, by necessary implication vests the trustees with the legal title. They must not only execute leases, but enforce them, put in tenants and dispossess them, the proper performance of which requires the title of the estate." Killam *v.* Allen, 52 Barb. 605.

30. A trust will never be implied unless the intention is apparent from the language. "To devise an estate by implication," says Chief Justice Denio, "there must be such a strong probability of an intention to give one that the contrary cannot be supposed. Devises by implication are sustainable only upon the principle of carrying into effect the intention of the testator, and unless it appears, upon an examination of the whole will, that such must have been the intention there is no devise by implication."[1]

31. The most important case containing a discussion of this principle is Post *v.* Hover,[2] in which the testator devised a part of his farm to his three grandchildren in equal shares, subject, however, to the payment of debts and legacies and other conditions. As they were minors, they were not to have the possession of the farm until they severally attained majority; and if either died before that time and left no issue, the survivors were to take his share; and if all died during their minority, the testator's son was to take the land in fee. The testator then directed that during the minority of the grandchildren his son should manage the estate, and from the avails support these children. He also appointed him their guardian, and in that capacity was to have charge of their estate. The supreme court held that though the will did not contain a specific devise of the estate, and could, perhaps, be executed as a power, its provisions were more consistent with those large and discretionary powers conferred on trustees.[3] The court added that powers very similar to those contained in the will under consideration had been held to create a trust, and to vest a legal title in the trustees by implication to enable them to collect the income of the

[1] Post *v.* Hover, 33 N. Y. 599; Rathbone *v.* Dyckman, 3 Paige, 9; Orphan Asylum *v.* White, 6 Dem. 201, 204.

[2] 33 N. Y, 593.

[3] Post *v.* Hover, 30 Barb. 312, 320.

property, and to apply it and to accumulate the surplus as prescribed by the will.[1] But the court of appeals thought otherwise. While admitting that ample powers of management had been bestowed on the son as well as the right to receive the rents and profits, yet "these duties could be very well executed under a trust power."[2] Besides, the appointment of the son as guardian during the minority of the children and the endowing him with authority in such capacity to act for them in the management of their estate were inconsistent with the existence of a trust, and negatived the idea that the testator intended to create one.

32. The importance of not recognizing a trust unless the language clearly indicates an intention to create one is well illustrated in this case. If the testator had attempted to create a trust it would have been invalid, because it was to run through three minorities; it could not end sooner. But if he created only a power, his evident intention was lawful and there was no difficulty in the way of executing it. Consequently Chief Justice Denio remarked that "the court ought never to imply a trust from general language where the duties committed to the alleged trustee could be executed under a trust power, and where the trust estate, if held to result from the language and general dispositions of the will, would be a violation of the statute."[3]

33. We may therefore deduce the principle that however convenient to the executor the possession of the legal title to an estate may be in order to carry out the testator's purpose, a trust estate will not be implied when this would constitute an illegal creation, and when the duties

[1] Bradley *v.* Amidon, 10 Paige, 235, 241; Leggett *v.* Perkins, 2 N. Y. 297, 305; Brewster *v.* Striker, Id. 19, 30, 36; Leggett *v.* Hunter, 19 Id. 445.

[2] Post *v.* Hover, 33 N. Y. 599. [3] Id. 601.

imposed on the executor can be executed under a trust power.[1]

34. Passing from the form of an express trust, we shall next inquire into the scope of the purpose for which it may be created. The principal questions under this head pertain to the payment of annuities, and to the mode of applying the income.

35. In the opening controversy over the statute, the question was debated whether an express trust included the creation and payment of an annuity; and was decisively settled in the affirmative. And a direction "to pay" to an annuitant, instead of the words "to apply to the use of" is just as effective.[2]

36. The next question was not so easily answered: is an annuity inalienable? It clearly is when existing under the third clause of the statute;[3] but it may be regarded as a legacy and charge on land, under the second or preceding clause of the statute which provides for the creation of a trust in land to satisfy any charge thereon,[4] and when an annuity is of this nature it can be alienated.[5] The answer, therefore, must be found in the will itself. How is the an-

[1] Post *v.* Hover, 33 N. Y. 601; Heermans *v.* Robertson, 64 Id. 332; Henderson *v.* Henderson, 113 Id. 1.

[2] Mason *v.* Mason's Ex., 2 Sand. Ch. 477, affd. 2 Barb. 229; De Peyster *v.* Clendining, 8 Paige, 295, affd. 26 Wend. 21; Gott *v.* Cook, 7 Paige, 521.

[3] Hawley *v.* James, 16 Wend. 118, 165, 262; Clute *v.* Bool, 8 Paige, 83. See McSorley *v.* Wilson, 4 Sand. Ch. 515.

[4] The entire clause of the statute is "to sell, mortgage or lease lands, for for the benefit of legatees, or for the purpose of satisfying any charge thereon."

[5] Hunter *v.* Hunter, 17 Barb. 25, 92; Lang *v.* Ropke, 5 Sand. 363; McGowan *v.* McGowan, 2 Duer, 57; Griffen *v.* Ford, 1 Bos. 123. In Gott *v.* Cook, 7 Paige, 521, 535, the annuities were not payable from the income of the estate merely, but were a charge on the principal of the fund. As they were not therefore inalienable under the sixty-third section which "is confined," says Chancellor Walworth, "to beneficial interests in the rents and profits or income of the property, they do not suspend the absolute ownership as to any part of the fund."

nuity raised, by the second or by the third clause? In Hunter *v.* Hunter,[1] the testator gave an annuity to his grandchildren, which was to be derived from the income of his estate, and Justice Strong held that it created no suspension as "it might be presently released by each, but for their minority,"—a disability not contemplated by the statute. Again, in Griffen *v.* Ford,[2] the widow of the trust-maker was to receive such a portion of the income of the estate as the trustee deemed necessary for her support, and her children were to receive the remainder. As this provision for her was regarded as an annuity and therefore a charge by the second clause of section fifty-five, no illegal suspense was created. If she outlived the children, the trust, nevertheless, terminated, and the annuity remained a charge on the land in the possession of the heirs as owners. Always then, when an annuity is created by the second clause it is not under the ban of suspension and can be alienated at the pleasure of the annuitant.[3] But when the entire rents and profits are to be paid over to an annuitant then he is a beneficiary under the third clause and the statute must be applied. Again, when the amount is fixed, does the taking of this sum from the rents and profits of the land bring the annuitant under that clause and thus render the annuity inalienable? Justice Duer maintained that the third clause covers only those cases in which the entire rents and profits are to be paid over, or otherwise applied to the use of the beneficiary, and does not cover those "in which the sum to be raised and paid over, whether immediately

[1] 17 Barb. 25, 92. [2] 1 Bos. 123.

[3] Matter of Tilford, 5 Dem. 524; Bradhurst *v.* Bradhurst, 1 Paige, 331, 346; Hawley *v.* James, 16 Wend. 61; Gott *v.* Cook, 7 Paige, 521, 535; Maurice *v.* Graham, 8 Id. 483; De Graw *v.* Clason, 11 Id. 136; Mason *v.* Jones, 2 Barb. 229, 242, 247; Lang *v.* Ropke, 5 Sand. 363; McGowan *v.* McGowan, 2 Duer, 57; Hunter *v.* Hunter, 17 Barb. 25, 92; Griffen *v.* Ford, 1 Bos. 123; Killam *v.* Allen, 52 Barb. 605; Johnson *v.* Cornwall, 26 Hun, 499, affd. 91 N. Y. 660.

or annually, is ascertained and defined."[1] But the opinion has been more generally maintained that an annuity, payable from the income of a trust-fund existing under the third clause, is rendered inalienable by the sixty-third section.[2] Inalienability attaches to the income regardless of its disposition. Certainly the statute has drawn no distinction between annuitants and other beneficiaries.

37. But why do annuitants, who live under the third clause, have a different destiny? For the unanswerable reason that such beneficiaries are clearly forbidden by the sixty-third section to alienate their interests. Thus in Hobson *v.* Hale[3] annuities in an estate were given which were to continue until the death of the last or twelfth annuitant. These annuities were created under the third clause, for the testator declared they should not cease until the death of the last of the twelve. They were, therefore, inalienable, and as they were to be paid for twelve lives, created an illegal suspension. "The right to the estate," says Justice Miller, "being thus held in abeyance during this period, and no estate being vested in any person by which authority was conferred to dispose of the same, it is very obvious that the power of alienation was suspended during the existence of the twelve lives named. No absolute fee could be conveyed until the death of the last life annuitant."

38. Another inquiry was started soon after the enactment of the statute concerning the duty of a trustee to apply the income accruing from the trust property. What must he do to justify the existence of such a trust? Must

[1] Lang *v.* Ropke, 5 Sand. 370; Matter of Tilford, 5 Dem. 524.

[2] Hawley *v.* James, 16 Wend. 116, 119, 156, 157, 165; Clute *v.* Bool, 8 Paige, 83, 86; Stewart *v.* McMartin, 5 Barb. 438. *Contra* Coster *v.* Lorillard, 14 Wend. 265. The chancellor decided otherwise in the James Will case, but he declared in Clute *v.* Bool, 8 Paige, 86, that his former impressions were wrong.

[3] 95 N. Y. 588, 610.

he receive the money and apply it to the use of the beneficiary; or is his duty fulfilled in simply paying it over, thus leaving the recepient to make the application? In Leggett *v.* Perkins,[1] a testator gave one-fifth of his real estate to each of his two daughters, who were to enjoy the income while living, and after death it was to go to their children. His trustees were authorized to take possession and improve the real estate thus devised, and to pay over the income to the two daughters. This was a valid trust; and the legal estate vested in the trustees while the daughters lived. Judge Gardiner, after asking the question what is meant by the words "to apply to the use of a person," answered: "'To apply to the use of' is to execute the trust *pro tanto*. It is such an application as will discharge the trustee from all responsibility on account of the fund, or the part of it, thus applied. This requires, (1) The authority, express or implied, of the creator of the trust. (2) An act of the trustee in pursuance thereof. (3) The assent, in some form, of the beneficiary, where he has legal capacity; or of his commitee or guardian, where he has not. An application 'to the use of' a person, like a delivery, or payment, implies an acceptance."

39. This case ended a long controversy among the judges concerning the validity of such a trust;[2] but two or three other cases may be noticed. In one of these the subject was considered in a lucid manner by Chancellor Walworth. In Gott *v.* Cook[3] the trustee was to receive the rents and profits of real estate, or the income of personal estate, for the benefit of the beneficiary, and to pay over the same to him when received, or to accumulate it for his use during his minority, and then to pay it over to him. This was, in legal effect, a trust to receive rents and profits or

[1] 2 N. Y. 297, 312.

[2] For the discussion contrary to the final conclusion see Coster *v.* Lorillard, 14 Wend. 321, and Jarvis *v.* Babcock, 5 Barb. 139. [3] 7 Paige, 521.

income of the estate and to apply the same to the beneficiary's use. Likewise a devise in trust to receive the rents and profits and apply them to the use of the testator's family is valid with respect to the purpose of its creation and passes the title to the trustees.[1]

40. Another illustration may be given. A testator devised to executors all his real estate in trust to sell the same whenever they should deem a sale expedient, to collect the rents, issues, and profits, to repair and improve the same with the personal estate, the rents of his real estate, or the proceeds of real estate that should be sold, and generally to manage the same as they should see fit, and were authorized, in their discretion, to lease or purchase, in their own name, residences to be occupied by his wife until her death.[2] It was contended that the duties of the trustees were not active, as there was no positive direction to them to apply the rents and income of the estate in a particular manner, nor to the use of any person as required to create an express trust. But this contention was answered by the court that another clause in the will clearly showed how the rents and income were to be applied.

41. The rule, therefore, is clearly established that a trust is valid containing authority to receive the rents and profits of land and to pay them over to the beneficiary even though he be free to make an application of them.[3]

42. The attempts which have been made to create express trusts that are not within the scope of the purposes

[1] Boynton *v.* Hoyt, 1 Denio, 53.

[2] Thomson *v.* Thomson, 55 How. Pr. 494.

[3] Leggett *v.* Perkins, 2 N. Y. 297; Vernon *v.* Vernon, 53 Id. 351; Marx *v.* McGlynn, 88 Id. 375; Fellows *v.* Heermans, 4 Lans. 235, 236; Matter of Livingston, 34 N. Y. 555; Gott *v.* Cook, 7 Paige, 521, affd. Kane *v.* Gott, 24 Wend. 641; Coster *v.* Lorillard, 14 Id. 331; Hawley *v.* James, 16 Id. 156; Mason *v.* Jones, 2 Barb. 229, 249, affd. by an equally divided court in 1849; Parks *v.* Parks, 9 Paige, 107. See Craig *v.* Hone, 2 Edw. Ch. 554.

specified in the statute may now be considered.[1] One of these is the conversion of real estate into money. Another is a trust to receive the rents and profits of land without any direction for applying them.[2] A third is the payment of debts from the rents and profits of land;[3] and a fourth is the partitioning of it and making conveyances for the same.[4] The devising of the rents of land to a person for life would be only another mode of devising the land itself and no express trust would be created. And if a testator should provide that the use of a farm should be under the exclusive control and management of his wife, the purpose would not be within the law.[5] Again, if he should devise all his property, real and personal, to his wife "in trust, nevertheless, for any child or children of mine living at the time of my decease under age," the trust with respect to the real estate would be void, but valid for the personal.[6] Such a will would lack any purpose for creating the trust recognized by the statute. Said the court in a case of this kind: "The simple provision is, that the property is given to the wife, in trust for the children. She is not empowered to receive the rents and profits, and therefore no estate is vested in her in the lands. There is no provision of our statutes that will validate this trust, and all trusts not authorized by them are abolished; we have no

[1] If a testator should create a trust for the lives of persons instead of their estate, it would be invalid. The estate would be entirely free from the control of the trustees. Fowler *v.* Depau, 26 Barb. 224, 239.

[2] Cooke *v.* Platt, 98 N. Y. 35. In this case Andrews, J., said that the trust could not be sustained as a trust to receive the rents and profits of land. "There is no direction to apply them to the use of any person or for any period. When received they are distributable, not as rents and profits, but because incorporated into the mass of the estate to be divided by the executors." See Heermans *v.* Burt, 78 N. Y. 259.

[3] Hawley *v.* James, 16 Wend. 149.

[4] Id.; Cooke *v.* Platt, 98 N. Y. 35.

[5] Blanchard *v.* Blanchard, 4 Hun, 287, 289.

[6] Hagerty *v.* Hagerty, 9 Hun, 175.

alternative, then, but to hold this to be a void trust so far as it relates to the testator's real estate. Neither is it valid as a power of trust, because the lands are neither to be sold nor mortgaged."[1] And if an express trust should be created to sell or mortgage land, granting authority to the trustees to receive the rents and profits, they would not be vested with any estate.[2] Indeed, an express trust cannot be created to sell land except to pay debts and legacies, though such a trust may be valid as a power in trust.[3] An express trust, therefore, to use and dispose of real and personal estate for the benefit of beneficiaries would be invalid, but good as a power.[4] Finally, such a trust cannot be created to enforce a forfeiture against a corporation in the event that the conditions on which a gift is made are not properly observed.[5]

43. If a trust is simply a mode for paying a legacy, and not a provision to maintain an infant, married woman or improvident person, it is not an express trust, and no unlawful suspension is created.[6] Only a trust to receive rents and profits of land and to apply them to the use of a person, or to accumulate rents and profits for the benefit of minors, suspends the power of alienating the estate. When the object of a trust is to collect and accumulate rents and other income, or to pay a sum in gross, the beneficiaries may release or assign the estate.[7] The statute provides that "the rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable."[8]

[1] Hagerty *v.* Hagerty, 9 Hun, 176.

[2] Boynton *v.* Hoyt, 1 Denio, 53. In Smith *v.* Edwards, 88 N. Y. 92, no express trust was created. See § 254 for a description of the trust.

[3] Smith *v.* Bowen, 35 N. Y. 83. [4] Id.

[5] Adams *v.* Perry, 43 N. Y. 487, 496.

[6] Dodge, Ex. *v.* Pond, 23 N. Y. 69.

[7] Radley *v.* Kuhn, 97 N. Y. 26, 31.

[8] Rev. Stat. Part II., Ch. 1, Tit. 2, § 63.

44. A trust is not infrequently created for several purposes, one or more of which may be lawful, and the others unlawful. In such a trust the unlawfulness of some of the purposes will not prevent the recognition and enforcement of the others. Thus in Darling *v.* Rogers[1] a trust was created to sell or mortgage an assigned estate for the benefit of creditors. This was regarded as a valid trust to sell the property, but void for the purpose of mortgaging it. As the subject is more closely related to another part of our work nothing more will be said in this place.

45. If a trust-maker has executed more than one instrument, a will and codicil for example, both will be regarded as expressing a single intention, and if this intention be an express trust, it will be established.[2]

46. While an express trust suspends the power of alienation, a power in trust (which is either to sell or to distribute)[3] preserves the alienating power.[4] For, a trustee under a power is never vested with the title to the trust property,[5] and it descends to the heirs or passes to

[1] 22 Wend. 483.

[2] Ward *v.* Ward, 105 N. Y. 68; Morse *v.* Morse, 85 Id. 53; Westcott *v.* Cady, 5 Johns. Ch. 334; Howland *v.* Union Theological Seminary, 5 N. Y. 193.

[3] Bean *v.* Bowen, 47 How. Pr. 306, 326.

[4] In Van Vechten *v.* Van Veghten, 8 Paige, 122, the chancellor declared that if the executors had unlimited discretion to execute a power of sale at any time during the lives of the four daughters of the testator "such a power would not indeed suspend the power of alienation; as the trustees might at any time convey an absolute estate in the premises by the extinction of the power without any violation of the trust. See opinion of Earl, J., in Heermans *v.* Robertson, 64 N. Y. 346.

[5] Blanchard *v.* Blanchard, 4 Hun, 290. Nothing less, so Justice Barker has remarked, than an authority to sell the trust property accompanied with the right to receive the income will vest the title in the executor, and they descend to the heirs or pass to the devisees of the testator subject to the execution of the power. Post *v.* Benchley, 48 Hun, 87, citing Crittenden *v.* Fairchild, 41 N. Y. 289; Morse *v.* Morse, 85 Id. 53. Chief Justice Comstock, in Downing *v.* Marshall, 23 N. Y. 336, 379, in giving the reasons

the devisees subject to the execution of the power.[1] Nor will the trustee's authority to receive the income preceding the interval of sale convert a power into an express trust. The collection is incidental to the sale; the trust does not primarily exist for this purpose.[2] As executors have no control over real estate, nor authority to receive the income therefrom, it has been maintained that

for the legislation on uses and trusts said: "The provisions of the statute were aimed against the attempt to create such estates or titles, but not against the duty, trust or power. This is perfectly manifest from the provision which declares that if an express trust be created for any purpose not enumerated, no estate vests in the trustee, but if the trust authorizes the performance of any act lawful under a power, it shall be valid as a power in trust (§ 58). There was, very wisely, no attempt to enumerate or define the acts which might be lawfully done under a power, and in that respect, therefore, the law was subjected to no innovation. The result is, that express trusts, using that term in the strict technical sense as descriptive of legal titles, vested in a trustee for the fiduciary purposes declared in the instrument, were abridged and confined to the enumerated classes. But the trust limitation, although not belonging to that class, if not otherwise unlawful, will be effectuated in a different mode. If of a positive character, the use is executed by vesting the title in the beneficiary. If active it takes effect as a power in trust, leaving the title in the donor or his heirs subject to the power." In Chamberlain *v.* Taylor, 105 N. Y. 192, Ruger, Ch. J., said: "Although the provisions of the will are inoperative to create a valid express trust under the statute, yet the power therein conferred might still be exercised as a power in trust, but in that event it is also expressly provided that the title shall descend to the heirs at law subject to the execution of the power (R. S. §§ 56, 58, 59,). It was held in Cooke *v.* Platt, 98 N. Y. 35, that a merely discretionary power of sale in the executors for purposes of distribution, even though connected with the right to receive the rents and profits did not vest them with title to real estate. Much less would this be so where no power to take rents and profits was given by the will or inferable from the purpose therein contemplated."

[1] R. S. §§ 56, 58, 59; Cooke *v.* Platt, 98 N. Y. 35; Konvalinka *v.* Schlegel, 104 Id. 125; Downing *v.* Marshall, 23 Id. 366; Chamberlain *v.* Taylor, 105 Id. 192; Scott *v.* Monell, 1 Red. 431; Germond *v.* Jones, 2 Hill, 569; Hall *v.* McLaughlin, 2 Bradf. 107; Lent *v.* Howard, 89 N. Y. 169; Stagg *v.* Jackson, 1 Id. 206; Moncrief *v.* Ross, 50 Id. 431; Lancaster *v.* Thornton, 2 Burr. 1027; Yates *v.* Compton, 2 P. Wms. 308.

[2] Greenland *v.* Waddell, 116 N. Y. 234, 240; Stagg *v.* Jackson, 1 Id. 206; Moncrief *v.* Ross, 50 Id. 431; Lent *v.* Howard, 89 Id. 169. But see Scott *v.* Monell, 1 Red. 431.

if they are expressly invested with this power by a will or other instrument, an express trust is created by implication;[1] but in endowing them with this authority no confusion of principle arises. The main purpose of a will or other instrument must be kept in the foreground. Is this to sell or distribute the property, or to keep it and apply the income? If the main purpose is to sell, no express trust can be reared on a foundation so slender as the incidental possession and payment of the income to the persons who are entitled to receive it.

47. If, therefore, an estate is never vested in a trustee under a power, how can the power of alienation be suspended by its existence? That he is never vested with it must be apparent when the nature of a power in trust is recalled. "A power in trust," says Justice Welles, "is to be understood in contradistinction to an estate in trust. The former is a mere authority or right to limit a use, while the latter is an estate or interest on the subject. A trustee is always vested with the legal estate, but this is not necessary with respect to the donee of the power."[2] Nevertheless, it has been assumed or asserted on several occasions that a suspension may be effected by means of a power.[3] May not this be questioned? It has been

[1] Betts *v.* Betts, 4 Abb. N. C. 317, 385.

[2] Farmers' Loan and Trust Company *v.* Carroll, 5 Barb. 652; Sterricker *v.* Dickinson, 9 Id. 516. For a description of a power in trust and what can be done under it, see opinion of Daly, Ch. J., in McGrath *v.* Van Stavoren, 8 Daly, 458-460. "A power is not an estate or interest in lands; unexercised it is an incumbrance, and when exercised the act performed by virtue of it is considered and construed as done by the donor of the power; if it were otherwise a power to sell, to be exercised at a future time, even a power in a mortgage, would be invalid, because lives were not taken as the periods of limitation for its exercise." Robertson, J., Eells *v.* Lynch, 8 Bos. 482.

[3] In Radley *v.* Kuhn, 97 N. Y. 34, Rapallo, J., said there were two ways of causing a suspension, "by an express trust, or power in trust of such a character that the land cannot be alienated during its continuance, or by a contingent limitation." See also Everitt *v.* Everitt, 29 N. Y. 71; Lang *v.*

well said that "the suspension of alienation by a power of sale seems to be a paradox, since it is difficult to conceive how alienation can be suspended by a power to alienate permitted by law." [1]

48. Since then the trustee under a power has authority to sell, or the land descends and vests by statute, subject to the trust, in the beneficiaries who have the right to dispose of the same, how can the creation of a power in trust work a suspension?[2] It is true that if the trustee cannot sell within a fixed period an illegal suspense is created unless the heirs can sell, but this is caused, not by creating a power in trust, but by witholding the power of sale. No power is given; power is withholden. Of course, the consequence is an illegal suspense.[3] A power in trust is an authority or direction to do something, and it cannot be withheld and exist at the same time.

49. A trust to receive the rents and profits of land and to apply them as directed by statute may be combined or co-exist with a power in trust to sell the land itself.[4] No conflict of authority necessarily arises, for the execution of the power does not begin until the time has come for the extinguishing of the trust; indeed this is one of the most frequent modes of terminating an express trust. In Belmont *v.* O'Brien[5] Justice Hand has remarked that "the same person may hold the estate in trust for one purpose,

Ropke, 5 Sand. 375; Belmont *v.* O'Brien, 12 N. Y. 403; Amory *v.* Lord, 9 Id. 403, 412, 413; Field *v.* Field, 4 Sand. Ch. 528; Brewer *v.* Brewer, 11 Hun, 153.

[1] Eells *v.* Lynch, 8 Bos. 481.

[2] Weeks *v.* Cornwell, 104 N. Y. 325.

[3] Stewart *v.* Hamilton, 37 Hun, 19.

[4] Vail *v.* Vail, 4 Paige, 317; De Kay *v.* Irving, 5 Denio, 646, 651; McSorley *v.* Wilson, 4 Sand. Ch. 515; Crooke *v.* County of Kings, 97 N. Y. 446; Belmont *v.* O'Brien, 12 Id. 394; Heermans *v.* Robertson, 64 Id. 350; King *v.* Whaley, 59 Barb. 71; Betts *v.* Betts, 4 Abb. N. C. 385; Manice *v.* Manice, 43 N. Y. 303; Morse *v.* Morse, 85 Id. 53; Tobias *v.* Ketchum, 32 Id. 319.

[5] 12 N. Y. 404.

and at the same time be a grantee of a power in trust, to be executed or take effect at some future day, for another."

50. A good illustration of combining an express trust and a power in trust is Bruner *v.* Meigs.[1] A trust was created for the benefit of the trust-maker's wife and seven children. The wife was to have the income of the estate during her life, and after her death each child was to have one-seventh during his lifetime, and then his issue was to have one-seventh of the estate itself. This interest was to be conveyed by the trustees. Thus they were endowed with an authority to manage the estate and pay the income to the beneficiaries, which constituted a valid express trust; and then on the death of each child to convey his portion of the estate to his issue, which was a power in trust. The remarks of Justice Allen may be profitably added: "The trust being for the leasing of real property, the collection of rents, the investment of the personal estate, the receipt of the income, and the paying and applying the rents and income to the use of the beneficiary for life, an estate was vested in the executors and trustees during the continuance of the trust. That trust ceased with the life of the person for whose benefit the rents and income of the estate were to be applied. The power and direction to transfer and convey the share or portion of the estate to those entitled under the will after the death of the *cestui que trust* for life did not constitute a trust, or require the estate to be vested in the executors and trustees named. It was merely a power in trust and could be executed as such. The estate and interest of those entitled in remainder did not depend upon the execution of that power, and the vesting of their estate could neither be defeated nor delayed by the neglects or omissions of those vested with the power."[2] In Skinner *v.*

[1] 64 N. Y. 506, 516.

[2] Manice *v.* Manice, 43 N. Y. 303.

Quin[1] the testator created a trust in his farm for the benefit of his mother and wife by which they were to have the income during the lifetime of the former. After her death, the executor was authorized to sell and convey the real estate and pay the proceeds to his wife. An express trust was combined with a power, and both were valid. The question may be asked, how much can the authority of a trustee under an express trust be diminished, or the authority of a trustee under a power be increased, without changing the specific character of the trust or power. This question arises when trusts approach the border-line, the difficulty in classifying them springing from the lack of some elements needful to determine their nature. When these are missing the question is, to which is the instrument most nearly likened, an express trust or a power. The difficulty may be solved by regarding an instrument which lacks any essential element of an express trust as only a power. Thus it happens that powers are recognized in which the trustees have more authority than is usually accorded to them, though having less than a trustee under an express trust. Thus it happens that powers are recognized "although," in the language of Chief Justice Andrews, "the duty imposed, or the authority conferred, may require that the executors shall have control, possession and actual management of the estate."[2] The same justice, on another occasion,[3] declared that the test is whether the instrument confers on the trustee an authority in respect to the land, and the power is conferred to accomplish one of the purposes mentioned in the fifty-fifth section of the statute.

[1] 43 N. Y. 99.

[2] Robert *v.* Corning, 89 N. Y. 237, citing Downing *v.* Marshall, 23 Id. 366; Post *v.* Hover, 33 Id. 593; Tucker *v.* Tucker, 5 Id. 408.

[3] Morse *v.* Morse, 85 N. Y. 60; Vernon *r.* Vernon, 53 Id. 351, and cases cited.

51. Moreover, the power in trust may be exercised by the trustee, or by the beneficiary. There is no impediment in the way of granting this power to either party. Indeed, an express trust has often been terminated by selling the trust property, which, of course, is done by exercising the power in trust inhering in the trustee or other person.[1] In Crooke *v.* County of Kings[2] the subject was fully considered. In that case the testatrix, A., created a trust and gave to B., her daughter, the power to end it by procuring a conveyance to herself of the trust estate. This conveyance was afterward made. Subsequently B. made a will and created another trust for the life of her husband, giving him power to sell the land, which was the subject of the trust. He sold it and then B.'s heirs sought to recover it of the purchaser, on the ground that the trustee had no authority to convey it, but the conveyance was sustained.[3]

52. Usually, a trust will not be regarded as express which can be executed as a power. Says Justice Allen: "An intent to create an express trust will not be presumed in the absence of an express declaration to that effect when the whole purpose of the deed, without peril to the rights of any person, can be accomplished under a power conferred by the deed."[4] Yet a trust does not always fail

[1] De Kay *v.* Irving, 5 Denio, 646, 654; Manice *v.* Manice, 43 N. Y. 364; Matteson *v.* Armstrong, 11 Hun, 245. See Blanchard *v.* Blanchard, 4 Id. 287.

[2] 97 N. Y. 421.

[3] "The author of the trust," said Earl, J., "as we have seen, may authorize the trustee to convey and thus terminate the trust, and I can perceive no reason why he cannot authorize the *cestui que trust*, to whom he could absolutely have given the property, to convey the same and thus terminate the trust. If an owner of property wishes to create a trust to exist during the will, either of the trustee or of the *cestui que trust*, I can perceive no reason, founded in public policy, why he should not be permitted to do so." Id. 448.

[4] Heermans *v.* Robertson, 64 N. Y. 332, 342, 343.

to be express whenever the authority conferred can be executed under a power.[1]

53. When a trust may be construed as an express trust or as a power, what test shall be applied to determine the question? Its purpose. Is this to keep the estate and apply the income, or to sell and distribute it? The purpose of an express trust is to preserve an estate; the purpose of a power is to dispose of it. In one of the earliest cases after the enactment of the law,[2] the question was raised whether the trustee had an unlimited authority to sell at any time during the trust. The court decided that no suspension existed as the trustees could convey an absolute estate by executing the power. Again, if a trustee holds an estate which is "to remain with her forever," but who is to devote and apply the same as she may see fit for a purpose authorized by law, for example, to keep in order a burial lot, the trust cannot create an unlawful suspension, because the trustee is empowered to consume the entire residue at once.[3]

54. Some illustrations may be given. In Tobias *v.* Ketchum[4] the testator provided for the distribution of

[1] "There are many authorities tending to sustain the proposition that a trust will be implied in executors when the duties imposed are active and render the possession of the legal estate in the executors convenient and reasonably necessary although it may not be absolutely essential to accomplish the purposes of the will and when such implication would not defeat, but would sustain the dispositions of the will." Andrews, Ch. J., in Robert *v.* Corning, 89 N. Y. 237, citing Craig *v.* Craig, 3 Barb. Ch. 76; Bradley *v.* Amidon, 10 Paige, 235; Tobias *v.* Ketchum, 32 N. Y. 329; Vernon *v.* Vernon, 53 Id. 351; Morse *v.* Morse, 85 Id. 53. See Brewster *v.* Striker, 2 Id. 19.

[2] Van Vechten *v.* Van Veghten, 8 Paige, 104.

[3] Pfaler *v.* Raberg, 3 Dem. 360.

[4] 32 N. Y. 319, 330. "The authority to rent and lease, to repair and insure, by necessary implication, vests the trustees with the legal title. They must not only execute leases, but enforce them, put in tenants and dispossess them, the proper performance of which requires the title of the estate. So to repair, there must be such a right of entry and control in the trustees as gives them complete dominion; and to insure, involves the

his real estate among his children, or its sale, six months after the death of his widow. They were clothed "with full power and authority to rent, lease, repair and insure" the estate "during any period of the time it shall remain unsold and undivided." These duties were declared to render the executors trustees for their performance "to the same extent as though declared to be so by the most explicit language." Said Justice Davis:[1] "the authority to sell the real estate and execute deeds thereof, as given by the will, standing by itself, would confer nothing but a power; but, coupled, as it is, with the various provisions for leasing, repairing and insuring, with the obligation to give to the widow a residence as she may elect, in any of the houses of the testator, it goes far to show that it was the testator's intention to vest the fee of the estate in the trustees."

55. In Aldrich *v.* Funk[2] the testator directed that if his children were not twenty-one years old when his wife died, his real estate was to remain under the control of "his executor" till each of them reached that age. This was neither a trust nor power in trust, for no specific duty was conferred on him, nor was he vested with a specific authority over the estate.

56. In Vernon *v.* Vernon[3] the testator gave a house to his wife, but power was also given to the executors to sell it for a specified price and to invest the proceeds for her benefit during her life. The executors took no title, for the wife's interest was not limited simply to the use

necessity of ownership, for the policy must be taken in the name of the trustees. But to repair and to insure necessarily involve expenses chargeable upon the rents and profits; and an executor who is authorized to lease, repair and insure by necessary implication, may so lease that rents will come to his hands out of which to pay repairs and insurance, and if a net income is to be paid out of such rents, the executor becomes the party whose duty it is to ascertain and pay it." Id. Davis, J.

[1] Id. 329. [2] 48 Hun, 367. [3] Vernon *v.* Vernon, 53 N. Y. 351.

of the premises ; and as the power of sale was contingent, not absolute, no implication arose from the direction concerning the investment of the proceeds which had the effect to cut down her estate to one simply for life. She was regarded, therefore, as taking a fee subject to sale.

57. Again, presuming that the creator of a trust intends to act legally,[1] the law will not declare a trust as express and then condemn it, because its author disregarded the rule of suspense, when it can be sustained and executed as a power in trust.[2] As Justice Finch felicitously remarks, "there is no such anomaly in the law as a trust raised by construction only to be destroyed in the moment of its creation."[3] Consequently, when the language is such that an intention to create either an express trust or power may be inferred, and the power would be legal and the express trust would not be, the lawful act is regarded as decisive of the testator's intention. In such cases, therefore, the courts always reject the express trust and sustain the power. The cases in which this principle has been applied to determine the testator's intention have been already noticed.[4]

58. But there is a qualification to the rule just mentioned too important to be omitted. If a testator has expressed his intention in an express trust, which is invalid by reason of creating an illegal suspense, the instrument

[1] Du Bois *v.* Ray, 35 N. Y. 162; Mason *v.* Jones, 2 Barb. 229, 244.

[2] For cases in which the trust was void as express, but valid as a power, see Garvey *v.* McDevitt, 72 N. Y. 556; N. Y. Dry Dock Company *v.* Stillman, 30 Id. 174, 190. A testator died leaving real and personal estate and provided for the sale of the residuary portion of it and the division of the proceeds equally between his wife and children. This devise was void as an express trust, but valid as a power in trust. Konvalinka *v.* Schlegel, 104 Id. 125, 130: Cooke *v.* Platt, 98 Id. 35 ; Henderson *v.* Henderson, 113 Id. 1.

[3] Smith *v.* Edwards, 88 N. Y. 102.

[4] Post *v.* Hover, 33 N. Y. 593; Smith *v.* Edwards, 88 Id. 92; Everitt *v.* Everitt, 29 Id. 39.

cannot be upheld as a power if by so doing the testator's intention would be disregarded or set at naught.[1]

59. From these illustrations to show the differences between express trusts and powers, and their form, we may pass to the exercise of the powers of sale and distribution. And we may begin by remarking that if trustees are empowered with authority to sell "in their discretion," yet from other language in the instrument the creator evidently intended that a sale of his real estate should be made and the proceeds be divided, the direction is imperative.[2]

60. Nor is the statute regulating the period of suspension violated by directions which may involve delay in converting or dividing property, caused by giving notice or other preliminary acts.[3] And if a testator should give his executors discretion to delay the sale of land for three years, even this would not create a trust-term, and consequently would not suspend the power of alienation.[4]

61. Nor is an unlawful suspense created by postponing

[1] Garvey *v.* McDevitt, 72 N. Y. 556.

[2] Delafield *v.* Barlow, 107 N. Y. 535.

[3] Manice *v.* Manice, 43 N. Y. 303, 364; Robert *v.* Corning, 89 Id. 238; Henderson *v.* Henderson, 113 Id. 1. In Matteson *v.* Armstrong, 11 Hun, 245, it was claimed that the postponing of the time for paying legacies one and two years after the death of the testator's widow created an unlawful suspension. But it did not. The court cited Tucker *v.* Tucker, 5 N. Y. 408; Manice *v.* Manice, 43 Id. 303.

[4] Robert *v.* Corning, 89 N. Y. 225. "It by no means follows," says Allen, J., "that the power of alienation is suspended because the right of immediate partition and division is withheld." Converse *v.* Kellogg, 7 Barb. 595; Gott *v.* Cook, 7 Paige, 521. The testator, in Stewart *v.* Hamilton, 37 Hun, 19, enjoined his executors "not to sell any of the real estate under three years unless sold to advantage. Sold on time if to advantage." This direction did not suspend the power of alienation. It did not prohibit the sale of the land during that period. See Collin *v.* Collin, 1 Barb. Ch. 630; Bogert *v.* Hertell, 4 Hill, 492; Fisher *v.* Banta, 66 N. Y. 468; Skinner *v.* Quin, 43 Id. 99; Kinnier *v.* Rogers, 42 Id. 531.

the division. In Vanderpoel *v.* Loew[1] the testator created a trust for the benefit of several children who were to have the income of the trust-fund, while the principal was to be kept *in solido*, and to be owned by them distributively and not jointly. This they were to receive when they became thirty. Said Justice Brady, concerning the testator: "He did not mean that the share should not vest, but that the distribution and payment of each proportionate part thereof to the different owners if more than one, should not be made until each arrived at the age of thirty years, a period in the life of each which he thought must necessarily pass before the object of his bounty would have the experience or ability, or both, to handle the principal. He gave the shares in severalty to the persons named or described, but restricted, for a limited period, the absolute unconditional use of them. 'You may enjoy,' he said in effect, 'the income, but you cannot control or dispose of the estate until you reach the age of which I think you should have that power.'"[2]

62. In Miller *v.* Struppman[3] the testator directed that a portion of his estate should be divided among his four children until the youngest attained the age of twenty-one years. In reply to the contention that this direction created an illegal suspense, Justice Daniels said that this was not the case, for the direction simply had the effect of preventing a division of the estate until the child

[1] 112 N. Y. 167, affg. 7 N. Y. State Rep. 304.

[2] In Manice *v.* Manice, 43 N. Y. 303, 368, 369, Justice Rapallo declared that where by a will shares or interests in real or personal estate to be ascertained by a division are given, or where real estate is directed to be sold and the proceeds divided, the estate or interest of the devisee or legatee, in the property to be divided or converted is a vested interest before the conversion or division, but if the intention is unequivocally expressed otherwise effect must be given to it, but that such an intention will not be imputed to the testator if it can be avoided. See Dickie *v.* Van Vleck, 5 Red. 298.

[3] 6 Abb. N. C. 343, 350.

reached the prescribed age unless dying before. In either event the estate was made dependent on the continuance of the minority before the property became divisible.[1] Likewise in Doubleday *v.* Newton[2] Justice James declared that the devisees, aside from their infancy, could alienate their interests notwithstanding the limitation of division contained in the will, which provided that the estate should be equally divided between them as they respectively arrived at the age of twenty-one years.[3]

63. In Henderson *v.* Henderson,[4] in which the executor was authorized to divide the estate among the testator's children who were living at the time of the partition, the issue of the deceased children were to receive their parents' portion, and if children died before the partition, leaving no issue, their portion was to be divided equally among the surviving children, but if they left issue, then they were to receive their parents' portion. The partition was to be made as soon as practicable after the testator's death, but this was not absolutely required until after five years from the probating of the will. He was authorized to take charge of the estate, lease, collect rents, insure, repair, invest, pay taxes, etc. Nevertheless, an express trust was not created, the legal title vested in the testator's children at his death, subject to the power of the executor to make a partition. He therefore had only a power in trust, which was valid. One of the judges who construed the will decided that an express trust had been created, and which having been created for a fixed period, was unlawful. This view did not prevail in the court of appeals, and the evident intention of the testator was sus-

[1] Lang *v.* Ropke, 5 Sand. 363; Burke *v.* Valentine, 52 Barb. 412.

[2] 27 Barb. 442.

[3] See Gott *v.* Cook, 7 Paige, 52; Converse *v.* Kellogg, 7 Barb. 595, and remarks of Finch, J., on this case in Bliven *v.* Seymour, 88 N. Y. 478.

[4] 113 N. Y. 1.

tained, of giving the executor a discretionary power of sale with the power during the interval to manage the estate and divide the income as the testator had directed.[1]

64. In the Betts' case[2] the executors were directed that within three years after the death of the testator's widow they should sell and dispose of all the real and personal estate, of which the testator should die seized or possessed, then remaining unsold, at public or private sale, and to pay off, without delay, the legacies, gifts and bequests named, and near the close of the will were further authorized to sell all the real estate at such times as they should think most advantageous for the estate. No illegal suspension was attempted by these directions. Said the court: "The testator provided only in effect that the sale should in no event be delayed beyond three years. This was not an unwise direction in the light of experience in such cases, but was an injunction to avoid delay in closing up the estate." Another remark of the court is worth adding that the injunction against postponement beyond that period did not suspend the power of alienation for any period after the widow's death, for there was a general authority to sell at such times as the executors deemed best, and under this the property could have been sold even in the widow's lifetime, followed by a distribution immediately thereafter.[3]

65. Even though a power of sale cannot be exercised for a definite period, "it does not," says Justice Earl, "necessarily suspend the absolute power of alienation." Certainly the non-exercise of the power does not have this effect when the beneficiary is vested with the title and is able to convey the real estate by warranty deed, and thus

[1] See Cooke *v.* Platt, 98 Id. 35.

[2] Betts *v.* Betts, 4 Abb. N. C. 317, 410, 411.

[3] The court cited Converse *v.* Kellogg, 7 Barb. 590; McKinstry *v.* Sanders, 2 T. & C. 181, 200; Manice *v.* Manice, 43 N. Y. 303.

defeat or annul the power of sale.'[1] Justice Earl supposed a case in which the title to land is vested by descent or devise in A. subject to a power of sale conferred on B., which is to be exercised after a definite number of years for the benefit of C. The power to alienate is not suspended. "There are persons in being who can by their concurrence convey an absolute fee; there is no law which prohibits C. from alienating or releasing his interest, but he is expressly permitted to do so.[2] He could unite with A. in a warranty deed of the land before the time for the execution of the power had arrived, and thus convey a perfect title. B. could not thereafter execute the power of sale because C. had by his own act deprived himself of the right to claim or receive the proceeds. Instead of uniting with A. in the conveyance C. could release to A. his claim to the proceeds of the real estate, and then A. would have a perfect title."[3] In Persons *v.* Snook[4] the power of the trustee to convey was suspended for three years. During the interval, however, the remainder, subject to the execution of the power, was vested in the heirs-at-law of the testator. The power of alienation, therefore, was not suspended. Justice Gilbert maintains that no time-restriction can be found in the statute within which a power of sale must be executed.[5] But this view has not always been maintained.[6]

66. In Blanchard *v.* Blanchard[7] the testator devised to

[1] Hetzel *v.* Barber, 69 N. Y. 1; Blanchard *v.* Blanchard, 4 Hun, 287.

[2] R. S. Part II, Ch. 1, Tit. 2, § 63.

[3] Garvey *v.* McDevitt, 72 N. Y. 556, 563. [4] 40 Barb. 144.

[5] Blanchard *v.* Blanchard, 4 Hun, 287.

[6] In Arnold *v.* Gilbert, 5 Barb. 190, it was declared that when the execution of a general provision trust to sell real estate, unlimited as to time, is not made to depend on the happening of any event which might possibly carry it beyond the direction of two lives in being the validity of such power cannot be objected to on the ground that it unduly suspends the alienation or absolute ownership of property.

[7] 4 Hun, 287.

his wife and two youngest children all his personal property and the *use*[1] of his farm for seventeen years after his death, and directed his executor, within two years from the expiration of that period, to sell the farm and divide the proceeds in a specified manner. By this devise the widow and children took an estate for years in the farm, and the remainder vested in the residuary devisees subject to the execution of the power of sale. As this power was naked, or peremptory, no unlawful suspense of the

[1] Justice Gilbert said that this was not a trust because the statute required the legal estate to be vested in the trustee in order to create a valid trust, and further it did not authorize such a trust. Justice Gilbert further remarked: "The statute does not aim to do anything more than to prevent the inalienability of estates beyond the prescribed limit. It has not sought to limit the duration of a lien or encumbrance thereon. The only provisions on this subject are the fourteenth and fifteenth sections of the statute relating to the creation and division of estates. The fourteenth section avoids future estates, which suspend the power of alienation. It is manifest that this section does not embrace the power in this case, because that does not create a future, or any other estate. The fifteenth section avoids limitations and conditions only. 'Conditions' and 'limitations' are terms well understood in law. A power is neither one nor the other. And, as before intimated, the residuary devisees in this case, who are the beneficiaries under the power, may at once alienate all the estate they got under the will. They can alienate the fee in the land, subject to the power, and they may sell their respective shares in the proceeds of the sale which shall be made in execution of the power. The statute on this subject expressly provides that limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in relation to future estates in lands, and those rules authorize the alienation of expectant estates. (R. S. Part II, Ch. 1. Tit. 2, §§ 2, 9, 35; Lawrence *v.* Bayard, 7 Paige, 76; Sheridan *v.* House, 4 Keyes, 588.) How then, and of what, is there a suspension of the power of alienation? We are not aware of any adjudication in conflict with the views on this subject, which we have now expressed. In Beekman *v.* Bonsor, 23 N. Y. 317, Comstock, J., remarked, that the power in trust in that case would have been a lawful one if the postponement of its execution for an absolute period of time did not suspend the power of alienation in a manner which the statute did not permit. This, however, was *obiter dictum*, and is hardly reconcilable with the decision of the same judge in Downing *v.* Marshall, 23 N. Y. 366, for, in the latter case, a power in trust, the execution of which was postponed until two lives in being was upheld."

power to alienate the land was created. In delivering the opinion of the court Justice Gilbert remarked that powers of sale, to be executed after the lapse of a period which might extend beyond two lives in being, had been often inserted in wills of real estate. Before execution the power was a lien or charge on the lands, and had no greater effect on the interests of heirs or devisees than a mortgage made by the testator, payable at the time fixed for the execution of the power would have had. No one would question the validity of a mortgage given by a testator to secure the payment of a sum of money twenty years after his death, because it contained the usual power of sale. No doubt such a power in either case obstructs the sale or other disposition of lands by the owner, but not by reason of the time limited for the exercise of the power. It would ordinarily have the same effect if no restriction as to time were imposed; but the absolute right of alienation of the fee is not affected thereby. In the case before the court the residuary devisees took an estate in fee, which, notwithstanding the incumbrance of the power, was neither defeasible nor conditional, and they could alienate it at pleasure. A conveyance from them and the devisees of the term would pass the whole estate.[1]

67. In Robert *v.* Corning[2] the court advanced a step and, speaking through Chief Justice Andrews, declared that "where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee, or in consequence of a direction reposed in him by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all

[1] Murray *v.* Murray, 7 N. Y. State Rep. 391; Eells *v.* Lynch, 8 Bos. 479, 480.

[2] 89 N. Y. 225, 235.

to the time of its actual exercise, and when a trust for sale and distribution is made without restriction as to time, and the trustees are empowered to receive the rents and profits pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation for the reason that the trustees are persons in being who can, at any time, convey an absolute fee in possession." The decision in this case is impregnable for the trustees were required to sell the estate within three years. And if no restriction to sell within a specified time is imposed on them, nevertheless no suspension of the power to alienate is created, because they can sell at any time. Having at all times the power to sell, the power of alienation is no more suspended by its non-exercise by them than by the owner and possessor in fee of an estate. As the Chief Justice says, the statute aims at the power, and not the exercise of it. If the trustees ought, for any reason to exercise the power and do not, they may be required to perform their duties, but their failure to do so does not in the least effect the existence of the power to alienate, which is given to them. The statute forbids the suspension of the power beyond a specified time, but when the sale of property is confided to trustees no suspension exists, for they can sell at any time.[1] Surely there can be no suspension of the power to sell when the power to sell exists. This is a manifest contradiction.

68. The power of sale, though, must be peremptory to prevent a suspension of the power of alienation. There

[1] In Van Vechten *v.* Van Veghten, 8 Paige, 122, the chancellor said that "if the executors had an unlimited discretion to execute [a] power of sale at any time during the lives of the *four* daughters [of the testator] such a power would not indeed suspend the power of alienation, as the trustees might at any time convey an absolute estate in the premises."

may be delay in exercising it, the executors may have large discretionary authority in this regard, but the duty to sell within some period or event that cannot possibly be farther away than at the end of a second life, is absolute. A discretionary authority to sell or not, as above explained, would clearly transgress the statute.

69. But suppose the power of sale is not exercised, is not the power of alienation suspended? This question has not been forgotten by the legal fishermen who have unweariedly set and watched the trust-net to catch unsuspecting testators.[1] Several answers may be given. The statute, as we have seen, aims at the power of alienation, and not the exercise of it.[2] Under a power the trustees have a power to sell, nay they must sell, within some period. Their disinclination or failure to exercise their authority, to execute the power, does not in the least affect the vesting of the estate.[3] Again, if there should be an unreasonable delay in selling or making a partition, the trustees can be compelled, by a legal tribunal, to perform their duties, or, if necessary, other trustees may be appointed to perform them.[4]

70. A trust-term, however, which suspends the power of alienation too long, cannot be mended by conferring authority on the trustees to sell the trust property if the proceeds must be held for the same purpose. Trustees may indeed be endowed with authority to sell land and to invest the proceeds in other real estate, but the suspense passes to, or runs with, the converted property.[5] The substitution "is not inconsistent with the inalienable na-

[1] Manice *v.* Manice, 43 N. Y. 365.

[2] Robert *v.* Corning, 89 N. Y. 225.

[3] Bruner *v.* Meigs, 64 N. Y. 506; Manice *v.* Manice, 43 Id. 303; Skinner *v.* Quin, Id. 99.

[4] Manice *v.* Manice, 43 N. Y. 365; People *v.* Norton, 9 Id. 176; De Peyster *v.* Clendining, 8 Paige, 295, 310.

[5] Hawley *v.* James, 5 Paige, 445, S. C. 16 Wend. 163.

ture of the trust estate in land."[1] More often real property is converted into personal. Whatever conversion or substitution may be made, so long as the property remains within the trust, the statutory rule regulating the suspense in alienation must be applied to it.[2] In Brewer *v.* Brewer this was the prominent question in the case. It was contended that by conferring a power of sale on the trustees they had an absolute fee in possession which could be conveyed. The court, speaking through Justice Brady, said that if the power was absolute, so that when the trustees sold they could pay over the proceeds to the beneficiary, there might be some force in the point taken, but such was not the character of the trust under consideration. The right to sell was part and parcel of the trust for the trust itself, and might or might not be exercised during the life of the trust. It was, therefore, co-equal with it and for it.[3] In a recent case Justice Earl remarks that if a power of sale has been conferred on an executor, yet the proceeds are to be invested and preserved from alienation for a longer period than prescribed by statute, such a power does not prevent an application of the statute. It is strictly true that the power to alienate the particular estate is not suspended when such a power exists, but this does not prevent the application of the statute if the proceeds are to be held con-

[1] Roosevelt *v.* Roosevelt, 6 Hun, 31, affd. 64 N. Y. 651; Belmont *v.* O'Brien, 12 Id. 394.

[2] Brewer *v.* Brewer, 11 Hun, 152, affd. 72 N. Y. 603; Hobson *v.* Hale, 95 Id. 588, 609. See Meserole *v.* Meserole, 1 Hun, 70, 71. See opinion of Finch, J., in Van Brunt *v.* Van Brunt, 111 N. Y. 178, revsg. S. C. 14 N. Y. Supp. 887.

[3] See cases cited by the court, Belmont *v.* O'Brien, 12 N. Y. 394, 405; Williams *v.* Williams, 8 Id. 525; McSorley *v.* Wilson, 4 Sand. Ch. 515; Amory *v.* Lord, 9 N. Y. 403, 412, 413; Field *v.* Field, 4 Sand. Ch. 528; Cruikshank *v.* Home for the Friendless, 18 Abb. N. C. 282, 290. Haynes *v.* Sherman, 117 N. Y. 433, 438.

trary to law. In such cases the sale is to be regarded simply as a conversion of the property, the statute applying either to the original or substituted property indifferently. In McLean *v.* MacDonald,[1] land was devised in trust, the trustees were to receive the rents and profits and to sell the same and invest the proceeds on bond and mortgage, and to collect the income and apply it during two specified lives to the use of persons named. This was a valid trust and power of trust combined. But there was no suspense of alienation, so Justice Earl said in Heermans *v.* Robertson,[2] because the trustees were empowered at any time to sell the real estate. "The fact that they were to invest the proceeds and continue trustees of them as personal estate had nothing to do with the validity of the trust as to the real estate." We cannot harmonize this view with that above expressed. If a trust is to continue after the conversion of real property into personal, the existence of the converting power is a mere incident in administering the trust, and does not keep alive the power of alienation.

SECTION III.

NATURE OF THE TRUSTEE'S ESTATE.

71. To create an express or active trust a present estate must be vested in the trustee.
72. The estate cannot be thus vested while the existence of the beneficiary is uncertain. Aliens.
73. It is vested only for such purposes as are required for the performance of the trustee's duties.
74. The reasons for vesting the title in the trustee.
75. When the trust is passive the title is not vested in him.
76. The trustee may be a beneficiary.
77. The trustee's title does not prevent the vesting of the estate in other persons subject to the trust.

[1] 2 Barb. 534.

[2] 64 N. Y. 332, 352.

71. To create an express or active trust a present estate must be vested in the trustee. A future or contingent trust cannot vest a present estate. Says Chief Justice Nelson:[1] "It is only express trusts that vest the estate in the trustees. * * The legal estate is given to them as convenient if not necessary to enable them to perform the trusts, to lease lands, to collect the rents, etc.; but great abuse would follow if permitted to vest them now with the legal estate to enable them to perform a future trust that might or might not happen. They would hold the title without any right to the possession. The estate would be in one person, and the possession and profits in another. This was a defect in the old law which it was intended to remedy in the fifty-fifth section, by confining trusts to active, and which must, of necessity, be present trusts. Where no present authority is given to lease, or to collect the rents, but to take effect at a future day, until it takes effect it cannot be said that any trust exists. It is in expentancy, or a trust by possibility."

72. A trustee cannot take the legal estate so long as the existence of a beneficiary to demand the rents and profits is uncertain. For there must be a person who can enforce the performance of the trust, otherwise the trustee could keep the rents and profits.[2] When an active trust is not created, the estate does not vest in the trustees, but descends to the heirs-at-law.[3] An alien may be a beneficiary; his incapacity to hold real estate does not apply to the income, for this is personal property.[4]

[1] Hawley *v.* James, 16 Wend. 116. See § 73.

[2] R. S. Part II, Ch. I, Tit. 2, § 60; Hawley *v.* James, 16 Wend. 16[illegible].

[3] Hawley *v.* James, 16 Wend. 151.

[4] In receiving the income he acquires no interest in the land save the right to enforce the performance of the trust in equity. Marx *v.* McGlynn, 88 N. Y. 357, 376; Anstice *v.* Brown, 6 Paige, 448; Meakings *v.* Cromwell, 5 N. Y. 136; Noyes *v.* Blakeman, 6 Id. 567; Craig *v.* Leslie, 3 Wheat. 563; See Beekman *v.* Bonsor, 23 N. Y. 316.

73. The estate is vested in the trustee because this is needful for the efficient execution of his trust. His interest, therefore is measured by his duties. The estate is vested only for such purposes as are required for their efficient performance.[1] His interest is temporary and ceases with the completion of his duties.[2] By statute it is provided that every express trust, valid as such in its creation, shall vest the whole estate in the trustee in law and equity, subject only to the execution of the trust. "This does not mean," says Justice Earl, "that the entire absolute fee shall be vested in the trustee, but simply so much of the estate as is put in trust and is necessary to feed the trust. The remainder of the estate may remain in the creator of the trust, or may be disposed of by him in some other way or to some other person. The trustee takes a legal estate commensurate with the equitable estate, the legal estate being essential to uphold the trust. It is the whole trust estate that is vested in the trustee. An estate may be so vested subject to remainders and other future estates, and subject to the execution of a power of sale on the part of any person who may terminate the trust. But during the continuance of the trust, the entire legal estate must be vested in the trustee."[3]

74. The need of vesting the title in him during the continuance of the trust has been clearly shown by Justice Jones. "Suppose a tenant neglect or refuse to pay his rent; an action against him, or an entry upon him, might be deemed advisable, but which, without the legal estate in the land, or very special covenants and provisions in

[1] Manice *v.* Manice, 43 N. Y. 363; DeKay *v.* Irving, 5 Denio, 653; Downing *v.* Marshall, 23 N. Y. 366; Everitt *v.* Everitt, 29 Id. 78, 79, 82.

[2] Gilman *v.* Reddington, 24 N. Y. 9.

[3] Crooke *v.* County of Kings, 97 N. Y. 446; Embury *v.* Sheldon, 68 Id. 227; Stevenson *v.* Lesley, 70 Id. 512; Vernon *v.* Vernon, 53 Id. 351; Sheridan *v.* House, 4 Abb. Ct. of App. Dec. 218.

the lease, would not be avaible to the executors. So, too, a stranger might intrude, or even a grandchild, if vested with the legal title, claim to enter or to hold, in defiance of the executors; and they, if clothed with and acting under the general authority and power conferred upon them by the will on the construction of them, as being powers merely without any right or interest in the land, would be powerless for the redress of the wrong unless by the aid and co-operation of the legal owners, and in their names. From these and other causes, serious impediments and embarrassments might be perpetually occurring to obstruct and hinder the executors in the full and beneficial performance of the trusts and duties enjoined upon them if held to possess and act upon powers only, and to have no legal title or estate in the land. Nothing short of a devise to them of the legal estate in the premises, by implication of law can effectually obviate all defects, impediments and difficulties, and give full effect to the testator's intention."[1]

75. When a trust does not authorize the trustee to take possession, or to receive the rents and profits, in short, imposes no action on him, it is merely formal or passive and he is vested with no legal or equitable estate.[2] An attempt to create an express trust, which in truth is nominal or passive, is invalid.[3]

76. The trustee ought not to be a beneficiary, and in the early days of the law the courts decided that he could not be. The reasons for his disqualification have been fully set forth by Vice Chancellor McCoun.[4] Nevertheless the the beneficiary has been often selected by the testator for executing his trust, and if he, who has a deeper interest

[1] Brewster *v.* Striker, 2 N. Y. 34.
[2] Jarvis *v.* Babcock, 5 Barb. 139.
[3] Salsbury *v.* Parsons, 36 Hun, 12.
[4] Craig *v.* Hone, 2 Edw. Ch. 554, 562; Hawley *v.* James, 16 Wend. 61

in its performance than almost any other person, makes such a selection why should the courts interfere. The objectons to the selection are more than balanced by the qualifications of the person selected, and this is the controlling reason doubtless with the testator. In any event if the selection be improper, this is no ground for overthrowing the trust, but simply for removing the trustee.[1]

77. With respect to the vesting of the estate, this is not prevented by the trustee's title. It vests, subject to the trust, as though no trust existed.[2] Thus in Embury *v.* Sheldon, the testator created a trust for the benefit of his four children J., A., D. and P. During J.'s life each child was to receive one-fourth of the net income, and after his death one-fourth of the residue was given to his children, and one-fourth to each of the children of the testator. If either A., D. or P. died leaving lawful issue they were to take their parent's share, but if leaving none, then the share was to go to the survivors. D. died after the testator leaving a son who, however, died in infancy. D.'s widow claimed his share by her husband's will and also by descent or succession from her son. On the other hand, it was claimed that the trustees were entitled to the entire estate, which prevented the vesting of the remainder in D., and therefore no estate passed from him to his son or his widow. The court, speaking through Justice Miller, delivered a very lucid answer: "By section fifty-five, express trusts may be created to receive the rents and profits of lands and apply the same as provided. By section sixty, every express trust valid in its creation, except as otherwise provided, vests the whole estate in the trustees subject to the execution of the trust, and it declares that

[1] Rogers *v.* Rogers, 111 N. Y. 228; Bundy *v.* Bundy, 38 Id. 410; Greenland *v.* Waddell, 116 Id. 242.

[2] Embury *v.* Sheldon, 68 N. Y. 227, 234; Hillyer *v.* Vandewater, 24 N. E. Rep. 999.

the person for whose benefit the trust is created shall take no estate or interest in the lands. From this provision it is plain that the trustees under the will become vested with a present existing legal estate, which was to terminate upon the death of J., the testator's son, in accordance with its provisions. The interest thus vested did not, however, extend beyond this. And while such estates existed each of the beneficiaries named in the clause cited also was seized of a vested interest in the remainder, with the right to the possession of the same upon the termination of the trust. This absolute estate existed upon the death of the testator. Section thirteen, declares that estates are vested where there is a person in being who has an immediate right to the possession of the lands upon the ceasing of the intermediate or present estate. D. was a person in being who had a clear right to a portion of the estate in question upon the termination of the trust; and comes directly within the provision last cited. This estate became vested when the testator departed this life. It is no answer to this position to say that the estate was vested in the trustees and D. had no interest under section sixty already cited, for the right acquired by the trustees was merely for the purposes of the trust and nothing beyond that. It is true that during the existence of the trust the trustees were given full power to administer the trust, and, for this purpose, were vested with entire control over the estate; but such a temporary interest does not interfere with or prevent the vesting of the remainder upon the termination of the trust estate, subject to the rights of the trustees during the intermediate period. Nor does the declaration in section sixty, to the effect that the *cestui que trust* shall take no estate, conflict with the right to the remainder, or prevent the vesting of the same. It only applies to the trust estate, and the two estates are entirely consistent, and may exist at the same time."

SECTION IV.

THE TERM MEASURERS.

78. The period of suspension of an express trust must be measured by lives.
79. Illustrations.
80. Suspense for the period of a mortgage.
81. Suspension during a lease, or fixed period.
82. Van Vechten *v.* Van Veghten.
83. Suspension for legislative action to grant a charter.
84. Nor can a gift be saved by the existence of a general law for creating an institution instead of a charter.
85. The application of income by trustees to a corporation for an indefinite period creates an illegal suspense.
86. But a direction to keep the principal of a fund intact and to use only the income is legal.
87. When a fixed term must be transformed into one for lawful lives it is valid.
88. Wisdom of the rigid administration of the rule questioned.
89. The reasons for adhering to it.
90. The term-measurers need not be beneficiaries.
91. The beneficiaries may limit the minimum period.
92. A different rule was first established.
93. The increase or dimunition of beneficiaries who are not term-measurers does not affect the existence of the trust.
94. Minority and adult age count as a single life.
95. What description of the term-measurers is required.
96. Burke *v.* Valentine. Guggenheimer *v.* Sullivan.
97. James *v.* Beasley.
98. McGowan *v.* McGowan.
99. Eells *v.* Lynch.
100. Douglas *v.* Cruger.
101. The time for reckoning the lives in a will-trust is from the testator's death.
102. The renunciation of the interest of the excessive number of term-measurers will validate the trust.
103. The time for reckoning lives in a power of appointment.
104. The lives must not by any possibility exceed the statutory period.
105. If an alternative estate is created it is valid if either alternative is not too remote.
106. Purdy *v.* Hayt.
107. Review of cases in which the question of the number of lives for which the trust was created was determined. Parks *v.* Parks.
108. Bolton *v.* Jacks.
109. Knox *v.* Jones.
110. Van Brunt *v.* Van Brunt.

111. Vail *v.* Vail.
112. Giraud *v.* Giraud.
113. O'Brien *v.* Mooney.
114. Shipman *v.* Rollins.
115. Van Vechten *v.* Van Veghten.
116. Scott *v.* Monnell.
117. Rogers *v.* Tilley.
118. Bean *v.* Hickman.
119. King *v.* Whaley.
120. Ward *v.* Ward.
121. Thompson *v.* Clendening.
122. Amory *v.* Lord.
123. Gott *v.* Cook.
124. Van Nostrand *v.* Moore
125. Surdam *v.* Cornell.
126. Matter of Russell.
127. Van Cott *v.* Prentice.
128. Brewer *v.* Brewer.
129. Fowler *v.* Ingersoll.
130. Converse *v.* Kellogg.
131. Consequences of adopting the rule that a trust should not be sustained if by any possibility the statutory period may be exceeded.
132. Departure from the rule.

78. The duration of the trust may next be considered. This must be measured by existing lives, "or by some more proximate event which may happen during life;" and the persons whose lives are to furnish the measure of suspension must be designated in the instrument creating the trust.[1] "The statute," says Vice Chancellor Sanford, "restricts the suspension of alienation and ownership to lives, and upon life only. It does not admit of a suspense for a term of years, however short," nor a suspense "dependent in part upon life and in part upon a fixed period of time."[2] This rule has been often applied, the period

[1] See remarks of Denio, Ch. J., in Everitt *v.* Everitt, 29 N. Y. 71, 72; Smith *v.* Edwards, 88 Id. 92. If a trust in real estate be created for the benefit of three or more minor children, and the trustees are endowed with discretionary authority to sell the same after the first child becomes of age, the trust is nevertheless invalid, for "the statute has given lives as the measure and nothing else." Bronson, J., in Hawley *v.* James, 16 Wend. 171; Thompson *v.* Clendening, 1 Sand. Ch. 387. If a testator should give his real and personal estate to his son provided he should ever have any lawful heirs that reached the age of twenty-one, the suspense would be illegal, for the son might have "any number of such children" who might die before reaching the prescribed age for the title to become absolute in the son. Brown *v.* Evans, 34 Barb. 594.

[2] Field *v.* Field, 4 Sand. Ch. 528, 546. "A gift," says Morgan, J., "is too remote, unless, according to the intention of the testator, some person must necessarily be in existence with legal power to dispose of the prop-

running down from twenty-one years to three.[1] The leading case is Hone's Executors *v.* Van Schaick,[2] in which the trust-term was to continue for twenty-one years, and a disposition of the income of the property was made for the entire period, even if all of the testator's children and grandchildren who were in being at his death died before its expiration. The whole trust estate and the several remainders were therefore void, as the remainders depended on the power to partition the estate after a suspension of the power of alienation for more than two lives in being at the death of the testator.

79. So, too, a trust for receiving and applying the income of real estate, until the youngest child of the trust-maker, if living, shall attain the age of twenty,[3] would be void, because the power of alienation would be suspended for a fixed period. "The utmost limit for the

erty within the period limited by the rules of law." Bean *v.* Bowen, 47 How. Pr. 306, 327, citing Curtis *v.* Lukin, 5 Beav. 147; Palmer *v.* Holford, 4 Russ. 403.

[1] In Hone's Executors *v.* Van Schaick, 20 Wend. 564, affg. 7 Paige, 221, the period was twenty-one years. See also Craig *v.* Hone, 2 Edw. Ch. 554. In Rose *v.* Rose, 4 Abb. Ct. of App. Dec. 108, five years; Gano *v.* McCunn, 56 How. Pr. 337, six years; Beekman *v.* Bonsor, 23 N. Y. 298, affg. 27 Barb. 260, fifteen years; Morgan *v.* Masterton, 4 Sand. 442, and Will of Underhill, 6 Dem. 466, three years; In Matter of Starr, 2 Dem., 141, twelve years; Rice *v.* Barrett, 102 N. Y. 161, ten years; Dodge, Executor *v.* Pond, 23 Id. 69, 79, ten years; Butler *v.* Butler, Hoff. Ch. 344, twelve years, and the same trust but another case, 3 Barb. Ch. 304; Smith *v.* Edwards, 88 N. Y. 92, twenty years; Bean *v.* Bowen, 47 How. Pr. 306, five years. So, too, a trust that land should not pass to the devisees until the expiration of a year from the death or marriage of the testator's wife would be void. Tucker *v.* Tucker, 5 N. Y. 408, 417.

[2] 20 Wend. 564.

[3] In Hawley *v.* James, 16 Wend. 119, Nelson, Ch. J., says: "Youngest of my children and grandchildren standing alone, might well enough refer to the youngest of each class," and the clause of the will in that case was held bad, because it said in addition the youngest living and attaining the age of twenty-one years, by which the intent to apply it to all the children was apparent. See remarks of Ingraham, P. J., in Burke *v.* Valentine, 52 Barb. 426.

continuance of the estate must be bounded by life, or the estate will be void in its creation. No absolute or certain term, however short, can be supported."[1] For the same reason a devise was void directing executors to pay money to the widow of the testator which was to be used in maintaining his family, consisting of more than two children, until a fixed day, when the estate was to be divided.[2] But if he had directed his executors to divide the land should his widow die before the day fixed for dividing it, the devise would have been valid.[3]

80. By applying the same rule a trust was defeated which was to run until the payment of a mortgage lien on real estate. In Killam *v.* Allen[4] this was the only limitation placed on the continuing of a trust which, if valid, might have run through seven lives. This was declared to be "a limitation upon the existence of a trust which the statute does not permit to be imposed."[5] But a trust to sell or mortgage land does not effect a suspension of the power of alienation for the statute provides that "a devise of land to executors or other trustees to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no estate in the trustees, but the trust shall be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator subject to the execution of the power."[6] The vesting of an estate therefore is not prevented by the granting of authority to sell or mortgage it.[7]

81. In another case,[8] the maker of a trust directed that his executors, four years after his decease, should

[1] Boynton *v.* Hoyt, 1 Denio, 53, 58.
[2] De Kay *v.* Irving, 5 Denio, 646, affg. 9 Paige, 521.
[3] Id. [4] 52 Barb. 605. [5] Id. 610.
[6] R. S. Part II, Ch. I, Tit. 2, §§ 56, 58, 59.
[7] Weeks *v.* Cornwell, 104 N. Y. 325, 338.
[8] Garvey *v.* McDevitt, 72 N. Y. 556.

sell his real estate and pay the proceeds to a bishop in trust for specified purposes, and until the sale they were to lease the estate and deposit the income in a bank. This was regarded as an attempt to create an express trust, which, if valid, would vest the title to the estate in the trustees and render it inalienable. As the period of suspension, however, was measured by a fixed period, and not lives, it was improperly created. Said Justice Earl: "This is a trust to lease lands for the benefit of a legatee, and hence it is one of the kind of trusts authorized by the statute,[1] and the trustees cannot alienate the lands during the trust term and the *cestui que trust* cannot dispose of his interest.[2] There is, therefore, a suspense of the power of alienation not limited by life, and hence the trust is void." For the same reason if the duration of a trust depended on the reformation of a person within a fixed period it would be invalid.[3] Life only can be the standard of measurement.

82. In like manner a testator may create an illegal suspense by giving a direction to lease his land for a longer period than two lives. In Van Vechten *v.* Van Veghten[4] the testator directed his trustees to lease the house in which he had lived during the lives of his four daughters. As a lease might be made, so the chancellor declared, which possibly would continue for more than two lives, the authority was void.[5]

83. The rule also applies to charitable donations of a public nature while they remain contingent and executory. For example, if a gift of money depends on the raising of a stated sum within a fixed period, the gift is not

[1] R. S. Part II. Ch. 1, Tit. 2, § 55.
[2] R. S. Part II, Ch. 1, Tit. 2, § 63.
[3] Moore *v.* Moore, 47 Barb. 257.
[4] 8 Paige, 104, 120, 121.
[5] See Greason *v.* Keteltas, 17 N. Y. 491; Matter of McCaffrey, 50 Hun, 371.

vested, but contingent and depending, not on a life or lives in being, but on an uncertain event, which may not happen within the prescribed period. Such a gift is invalid.[1] Likewise a gift to a corporation which the donor expects that the legislature will establish is a transgression of the statute, for the legislature may never establish it, or not within the statutory number of lives. The possibility that it may never do this, or not within the required life-period will nullify such a gift. This is a very harsh construction of the statute; it has defeated some great and highly meritorious bequests, and it has been applied with unbending rigor.[2] But whenever the donor provides that if the legislature shall fail to grant a charter during one or two specified lives the gift shall be vested in other legal ways, the law is satisfied.[3]

84. Neither can such a gift be saved by the fact that an institution of a similar character can be incorporated by the general law of the state. If the testator intended to give to one which should be established by a special charter, no other kind of institution can be substituted therefor.[4]

85. The rule seems less harsh that withholds from trustees the right to apply indefinitely to an object the income of a trust-fund.[5] In one case the object was to support the minister of a church.[6] In another[7] the income was to be paid to an incorporated academy. In this case Justice Grover remarked that the trust was not meas-

[1] Rose *v.* Rose, 4 Abb. Ct. of App. Dec. 108.

[2] Bascom *v.* Albertson, 34 N. Y. 584; Leonard *v.* Burr, 18 Id. 107; Levy *v.* Levy, 33 Id. 97; Cruikshank *v.* Home for the Friendless, 113 Id. 337, Dodge, Ex. *v.* Pond, 23 Id. 69; Beekman *v* Bonsor, Id. 298, 306; Rose *v.* Rose, 4 Abb. Ct. of App. Dec. 108.

[3] Burrill *v.* Boardman, 43 N. Y. 254; Shipman *v.* Rollins, 98 Id. 311.

[4] Cruikshank *v.* Home for the Friendless, 113 N. Y. 336, 338.

[5] Adams *v.* Perry, 43 N. Y. 487, 499; Cottman *v.* Grace, 112 Id. 299; Williams *v.* Williams, 8 Id. 554; O'Hara *v.* Dudley, 14 Abb. N. C. 71.

[6] King *v.* Rundle, 15 Barb. 139. [7] Adams *v.* Perry, 43 N. Y. 487.

ured by lives, or in any other way, but was made perpetual. "It is entirely clear that a faithful execution of the trusts will for all time suspend the absolute ownership of the property as the only disposition or use permissible must be in subordination thereto."

86. But a direction by the testator that the principal of a fund shall be kept inviolate, and that the income only shall be expended will not infringe the statute regulating the suspension of the alienation of property. If the principal is vested the law is observed. In Wetmore *v.* Parker[1] it was contended that the statute had been violated by a direction to invest the principal which took away the *jus disponendi*, without which there cannot be absolute ownership. But Chief Justice Church answered that "inalienability can only exist when there are no persons in being who can convey a title. If the whole interest in this property is not in the corporation, the remaining interest is in the heirs and representatives of the testatrix; and by a united conveyance a perfect title may always be conveyed. Upon either view of the question there exists the *jus disponendi* in persons in being, and hence there is no suspension of ownership."

87. Whenever a fixed term must be transformed into a term limited by one or two lives, no illegal suspense is created. Thus a bequest to the testator's widow of one-half of all the income of his real and personal estate for the term of fifty years from his death would be good, for this might be a period less than her life and could not extend beyond it.[2]

88. The courts have never departed from this plain statutory rule in determining the period of suspense—two lives and a minority. Yet they have questioned the wisdom of maintaining a rigid application, and Chan-

[1] 52 N. Y. 450, 459. [2] Matteson *v.* Matteson, 51 How. Pr. 276.

cellor Walworth favored the suspension of the power of alienation during a moderate term of years,[1] which was permitted by the common law, but the highest court refused to follow him. In Morgan *v.* Masterton,[2] the evil consequence of not sanctioning such a suspense was clearly seen. The creator of a trust directed his trustees to keep the income of his real estate for three years, and at the end of that period, if the amount was sufficient, or with additions contributed by others, to spend the same for a public statue. But, as the period for suspending the power of alienation was not dependent on lives, the trust could not be executed, though the desirability of adorning New York with tasteful statues will hardly be questioned. On more than one occasion[3] trusts holding large and generous designs for the public good have been smitten down by the judicial power for controvening this rule.

89. Nevertheless, the rule is grounded in strong reasons. First, the statutory requirement is very simple, and a different rule would be an obvious departure from it. The statute says and means lives, and not fixed periods. Again, if a departure was permitted, how far should the courts go, what fixed period should be established—three years, five, ten or fifty? Should different periods be established founded on the every-varying circumstances surrounding the cases presented for determination? These reasons clearly justify the courts in maintaining the plain statutory rule.[4]

90. Though the two lives who are to furnish the meas-

[1] Hawley *v.* James, 5 Paige, 318.

[2] 4 Sand. 442, 449. In delivering the opinion in this case Duer, J., remarked: "It is probably a subject of just regret that the opinion of Chancellor Walworth, allowing a suspense of the power of alienation during a moderate term of years, was not followed in the court of errors."

[3] See §§ 78, 83.

[4] Hawley *v.* James, 16 Wend. 126-133, 169.

ure, or constitute the standard of the trust-term, must be in being at the time of creating the trust (unless it cannot endure beyond the life of the creator),[1] they need not be beneficiaries.[2] In Crooke *v.* County of Kings the trust was limited for its beneficial objects to the lives of the nine children of the testator. Had the duration of the trust been measured by their lives, the power of alienation would have been suspended beyond the statutory limit; but the evil was corrected by limiting the trust to the life of one person, the trustee.

91. But when a trust is thus formed, with non-beneficiaries for term-measurers, its minimum duration must depend on the lives of the beneficiaries, otherwise, if they died first, the trust would remain without objects to support it. Certainly such a trust would not be valid. The result, however, may be effectually prevented by limiting the minimum period of the trust to the lives of the beneficiaries. Such a limitation does not transgress the statute, for that fixes only the maximum period.[3] The trust shall not last longer than two lives. Its duration for a lesser period may be determined, not only by the lives of the beneficiaries, but by the sale of the property, or on the happening of any event prescribed by the trust-maker.[4]

92. Formerly, when the trust-term was regarded as dependent on the lives of the beneficiaries, an application of the principal in Downing *v.* Marshall[5] defeated the trust. The trust-maker devised his factory to his executor in

[1] In such a case the power of alienation is not unlawfully suspended even if one of the designated beneficiaries is not in being at the time of creating the trust. De Peyster *v.* Beekman, 55 How. Pr. 90.

[2] Crooke *v.* County of Kings, 97 N. Y. 421; Bailey *v.* Bailey, Id. 460.

[3] "The statute does not aim to do anything more than to prevent the inalienability of estates beyond the prescribed limit." Gilbert, J., Blanchard *v.* Blanchard, 4 Hun, 291.

[4] Crooke *v.* County of Kings, 97 N. Y. 421.

[5] 23 N. Y. 366, 377.

trust, who was to keep it in operation during the lifetime of two designated persons, and distribute the income to several associations; and after the death of the survivor to sell the factory and distribute the purchase-money among them. Thus the trust depended on "two natural persons having no interest in its performance. Such a limitation," said Chief Justice Comstock, "is plainly unsupported by any construction which we can give to the language of the statute."

93. One of the logical consequences of this rule is that the duration of a trust-term is not affected by the increase or diminution of beneficiaries who are not term-measurers, and if one dies his portion or interest may be shifted to another.[1] Nor need the succeeding beneficiary have been in existence when the trust was created.[2] Justice Andrews' remark is worth adding: "It is no objection to

[1] Gilman *v.* Reddington, 24 N. Y. 9; Purdy *v.* Hayt, 92 Id. 446; Manice *v.* *v.* Manice, 43 Id. 303; Woodgate *v.* Fleet, 64 Id. 566, 571; De Peyster *v.* Beekman, 55 How. Pr. 90. In Gilman *v.* Reddington, 24 N. Y. 13, Comstock, Ch. J., remarked that "if the person primarily designated dies during a trust-term lawfully constituted in respect to its duration there is nothing in the terms or policy of the statute which prevents the use from being shifted to some other object of a testator's bounty. Nor had it ever been held that the person or persons must all be named or in existence, and known at the creation of the trust. * * The law ought not to condemn a succession in favor of the unborn issue of a child who may die before the time which the author of such a trust has lawfully prescribed for its termination. Future and contingent limitations of real estate in favor of unascertained persons, and especially in favor of the issue expected to be born of a son or a daughter, are familiarly known to the law, and I am satisfied that our statute of uses and trusts does not exclude them where the interest beneficially given is in rents and profits. * * The statute allows the application of rents and profits to the use of 'any person,' and this fairly includes a contingent limitation in favor of persons who are unascertained at the creation of the trust."

[2] Crooke *v.* County of Kings, 97 N. Y. 439; Woodgate *v.* Fleet, 64 Id. 569; Harrison *v.* Harrison, 36 Id. 546; Bradley *v.* Amidon, 10 Paige, 235; Post *v.* Hover, 33 N. Y. 600; Gilman *v.* Reddington, 24 Id. 9; Manice *v.* Manice, 43 Id. 376.

the validity of a remainder-in-fee that it is limited in favor of persons not in being when the limitation is created, or not ascertainable until the termination of a precedent estate, provided only that the contingency upon which the remainder depends must happen within, or not beyond, the termination of the prescribed period for the vesting of estates."[1]

94. If one or both of the designated lives should be minors, a suspension during their minorities and continuing afterward would not be invalid. Their age does not affect their capacity as term-measurers. Says Justice Andrews: "A suspension during the minority of a designated individual and a further suspension during the life of the same person, does not in legal effect differ from a single suspension in the first instance during the life of that person."[2]

95. In designating the trust measurers what description is required? In Hawley *v.* James,[3] Justice Bronson said that this might be done either by naming two persons in particular, or else by describing a class of persons and bounding the suspense of alienation by the lives of the two first who should die of the class.[4] The designation of the two oldest or two youngest would be effectual. Chief Justice Nelson intimated in the James will case that if the testator had bounded his trust by the youngest of his children and grandchildren this designation would have satisfied the statute;[5] and in a later case the designation of a term measurer as "my youngest child" was deemed equivalent to a designation of her by name.[6] In

[1] Purdy *v.* Hayt, 92 N. Y. 456; Gilman *v.* Reddington, 24 Id. 9; Manice *v.* Manice, 43 Id. 303.

[2] Benedict *v.* Webb, 98 N. Y. 465.

[3] 16 Wend. 172.

[4] See Jennings *v.* Jennings, 7 N. Y. 547.

[5] 16 Wend. 119.

[6] Eells *v.* Lynch, 8 Bos. 477; James *v.* Beasley, 14 Hun, 520; Roe *v.* Vingut, 117 N. Y. 204; Burke *v.* Valentine, 52 Barb. 425, 426. See Ruppert's Estate, Tucker, 480, 489.

Holmes *v.* Mead[1] the objection was made that there was no ascertained or well-defined beneficiary. He was designated as the minister officiating at a church named in the trust. "Although the particular individual is not named," said Justice Allen, "he is so described that he is capable of being identified and distinguished from every other human being. There is nothing uncertain or indefinite in the description. A *cestui que trust* need not necessarily be described by name; and any other designation or description by which he may be identified will do as well." But if the beneficiary's name has been omitted, the law does not imply that the creditor of the trust is the beneficiary. In Dillaye *v.* Greenough[2] the court remarked: "Plausible reasons might be given for a trust to apply the rents and profits to the use of other than the author of the trust, or for a trust to accumulate them for some lawful purpose. There is no implication so clearly shown as that no other can by possibility be made."

96. If a trust be created for several, until the youngest child shall attain majority, the suspension is for only one life,[3] but if the suspension must continue during the minority of all, and there are more than two, then the suspension is unlawful. Thus in Burke *v.* Valentine[4] the estate was left for the use of the testator's wife and children until the youngest became twenty-one, which was to be divided among them equally. At his death or majority, therefore, the estate vested in all of them. In the James will case[5] the same construction would have

[1] 52 N. Y. 332, 343.

[2] 45 N. Y. 438, 446.

[3] Benedict *v.* Webb, 98 N. Y. 460, 464. See, also, Butler *v.* Butler, 3 Barb. Ch. 304, 310, and Du Bois *v.* Ray, 35 N. Y. 162.

[4] 52 Barb. 412.

[5] The testator said: "I have also determined that this trust shall continue, and that the final division of my estate shall not take place until the youngest of my children and grandchildren, living at the date of this my will and attaining the age of twenty-one years, shall have attained that age."

been applied had not the testator added a clause by which he intended the trust to continue until all of his children and grandchildren became twenty-one, before they should enjoy the estate. In the Benedict case there were four children, two sons and two daughters. One son and one daughter were minors. The trust was to continue until the minors became of age. The sons were then to have their portions, but the trust was to continue during the lifetime of the daughters. Consequently, the suspension was for three lives and was void. In other words, the trust-term was for the minority of one son and the lifetime of both daughters. In another case the trustee was to pay the income from one-third of the testator's estate to the trust-maker's wife while she lived. The residue was bequeathed in five equal portions for the benefit of his children. The income was to be applied to their education and support until they should respectively attain the age of twenty-one. After that time, each was to receive, semi-annually, an entire fifth of the income, which was to be increased on the widow's death by adding one-fifth of the income she had received. When the "youngest heir" became twenty-five each was to receive one-fifth of the estate and the trust was to terminate. This trust did

Bronson, J., in interpreting this language, remarked: "The continuance of the trust does not depend upon the minorities of the youngest child and the youngest grandchild in the class; nor does it depend on the minority of the youngest person in the class. If it did only two lives in the former case, and one in the latter would be involved in the term. But the testator has directed that the trust shall continue 'until the youngest of my children and grandchildren, living at the date of this my will, and attaining the age of twenty-one years shall have attained that age.' There is but one class of minors, and the trust is to continue, not until the youngest in the class attains his full age, but until the youngest attaining the age of twenty-one, shall have attained that age. In other words, the term does not depend on the minority of the youngest in the class, but on the minority of the youngest who shall attain the age of twenty-one years." 16 Wend. 168, section 17 of the will.

not create an unlawful suspension, for by the "youngest heir" he meant the youngest child, and the duration of the trust, therefore, depended only on the child reaching the age of twenty-five.[1]

97. In James *v.* Beasley[2] the testator devised his real estate to his wife, so long as she remained his widow, and after her death he directed his trustees to sell the real estate and invest the proceeds for the benefit of his children until the youngest daughter reached the age of twenty-one. Then the estate was to be divided among his children, the shares of the daughter were to be paid over, but the shares of the sons were to be held in trust till the youngest reached the age of twenty-one, when they were to receive them. This trust was declared valid, for the power of alienation was suspended only during the life of the widow and the minority of the youngest daughter. This case is noteworthy because it is clearly distinguishable from Hawley *v.* James[3] "in the singling out of one child from a class. The limitation is upon the minority of the youngest, not of the one who may happen to attain her majority."[4]

98. In McGowan *v.* McGowan,[5] a testator devised all his real estate to his wife "for her own behoof, and the maintenance of his children, and upon his son John [the youngest child] becoming of age, the whole estate to be equally divided among his seven children [naming them], and that should death take either from the world it should be equally divided among the survivors." This devise occasioned no suspension of alienation except during the minority of the children, Justice Duer adding: "Even could we hold that the will creates an express trust sus-

[1] Guggenheimer *v.* Sullivan, 12 Week. Dig. 541.
[2] 14 Hun, 520.
[3] 16 Wend. 61.
[4] Barrett, J., James *v.* Beasley, 14 Hun, 520.
[5] 2 Duer, 57; Lang *v.* Ropke, 5 Sand. 363.

pending the power of alienation, the suspense is limited to a single minority, and is, therefore, valid. According to the settled construction of such a limitation, the suspense would terminate on the death of John, the youngest child, and is therefore confined to a single life in being."

99. In Eells *v.* Lynch[1] the testator gave to his widow the use of his house until "my youngest child shall attain the age of twenty-one years," provided that she remained his widow. When he reached that age it was to be sold, a portion was to be invested, and the income was to be paid to the wife, and the remainder was to be divided among the testator's children and grandchildren. If any child died before the division, his share was to be divided among the survivors. This created no illegal suspension, for the child who was to measure the period of suspension was clearly enough designated, as much so as by the insertion of his name in the instrument.

100. In another case J. conveyed land to N., in trust, to receive the rents and profits and apply them to the use of E., his wife, during their lives, but if she should die before him, then the remainder was to go to her children. This was a valid trust.[2] The contention was that the trust was void "because not for her life." But the court said: "It is a trust for the joint lives of herself and her husband. If she dies first, it terminates with her death; if he dies first, it terminates with his death. Hence it is a trust to receive rents and profits, and apply them to her use during her life, or for a shorter term, and it is therefore authorized by section fifty-five."

101. In determining the number of term measurers, it may be remarked that only those are to be reckoned who are alive when the trust becomes effective.[3] Suppose a

[1] 8 Bos. 465. [2] Douglas *v.* Cruger, 80 N. Y. 15, 20.

[3] "The absolute power of alienation of real, and the absolute ownership of personal property, cannot be suspended by any limitation or condition

testator at the time of making his will included a trust limiting its duration to three lives, one of whom died before himself, would not the constitution of the trust be valid? A negative answer was given on one occasion,[1] but it is not the law. Says Justice Duer: "It is certain that lives in being at the death of the testator are alone to be considered."[2] Thus in Griffen *v.* Ford a trust was created by will for the benefit of three children, but only two survived the testator. Had all been living at that time there would have been an illegal suspense, but as only two were alive, the suspensory period did not exceed the legal number. This is simply another application of the general rule that a will speaks from the death of the testator.[3] The trust-term, or estate, therefore, begins at that time, and also the period of suspension.[4]

102. In like manner if a testator should devise an estate for the use, and during the lives of three persons, and one of them should renounce his interest therein on the death of the testator, an unlawful suspense would not be created. The will would be regarded as though the provision "never had been made."[5] Thus a testator gave his widow the use of a house in lieu of dower and after her death it was to form a part of the residue of his

whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate; and where the disposition is by will, the death of the testator is deemed the commencement of the estate." Denio, Ch. J., in Everitt *v.* Everitt, 29 N. Y. 71.

[1] Odell *v.* Youngs, 64 How. Pr. 56.

[2] Griffen *v.* Ford, 1 Bos. 123, 136, 140; Lang *v.* Ropke, 5 Sand. 363; Lang *v.* Wilbraham, 2 Duer, 171; Du Bois *v.* Ray, 7 Bos. 300.

[3] Butler *v.* Butler, 3 Barb. Ch. 311.

[4] De Peyster *v.* Clendining, 8 Paige, 295, 304; Adams *v.* Perry, 43 N. Y. 498, 499; Butler *v.* Butler, 3 Barb. Ch. 111; Amory *v.* Lord, 9 N. Y. 418. The time of creating the estate is "at the publication of the will." Hawley *v.* James, 16 Wend. 136. See Van Brunt *v.* Van Brunt, 111 N. Y. 185; McArthur *v.* Scott, 113 U. S. 340; Hosea *v.* Jacobs, 98 Mass. 65; Cadell *v.* Palmer, 1 Clark & Fin., 372; Penfield *v.* Lower, 46 N. W. Rep., 413.

[5] Bailey *v.* Bailey, 97 N. Y. 471.

estate. The power to alienate this residue, however, was suspended during the lives of two persons. It was contended, therefore, that the suspension was not lawful, because it was extended through the lives of three persons. But she declined to accept the estate left to her, so that it immediately fell into the residue.[1] Perhaps this should be regarded as a dictum, and not a determination of the court; surely it is difficult to harmonize such a rule with the one early established that the limitation in the will or other instrument must terminate in every possible contingency as the law has prescribed.[2]

103. Not infrequently testators create trusts giving their wives and children the income of property during their lives, with a power of appointment or disposition of it afterward. In making dispositions in accordance with the authority thus conferred, other trusts are often created which continue the suspension of the alienation of the property. A question might have arisen from what time or event is the suspension to be reckoned had not the statute provided that "the period during which the absolute right of alienation may be suspended by any instrument in execution of a power shall be computed, not from the date of such instrument, but from the time of the creation of the power."[3] This is a plain rule and no difficulty has arisen in applying it. In Mott *v.* Ackerman,[4] the testator created a trust for the benefit of his three daughters during their lives. If one died unmarried she had the power to make a complete disposition by will of one-third of her father's estate "upon such trust and for such purpose as she shall or may appoint." One of the daughters, E., made a will

[1] Bailey *v.* Bailey, 97 N. Y. 460, 471. Her estate, however, had she accepted the same, was alienable, so that no illegal suspense would have been created if she had accepted it.

[2] See § 104, also §§ 131, 132.

[3] R. S. Part II, Ch. 1, Tit. 2, § 128.

[4] 92 N. Y. 539, 550.

and gave her estate to her two sisters, "and to the survivor of them" and to the heirs, executors and administrators of such survivor. It was contended that an illegal suspense had been created, as the computation must run from the creation of the power of appointment. Consequently there was an estate for life in E., then a devise to her two sisters, then to the survivor of them, and lastly to the heirs, executors and administrators of the survivor. But the limitation was legal. In the first place the last limitation was not really of this character, but a description of the estate that vested in the survivor. The devise to E. was one life, then the estate passed to her sisters, but they took as tenants in common and not as joint tenants, and so neither portion was owned by only two lives. Each of them would indeed have been absolute owners except for the further limitation to the survivor. This limitation, however, was valid, for the contingency on which it depended must happen within two lives.[1] The fee giving to the one who should die first was defeasible by her death, and "thereupon the entire absolute estate vested and could be aliened after two lives at most." In these cases, therefore, the period of suspension begins at the time of creating the power.[2]

104. At the beginning of the trust period the number of lives who are to limit its duration must not exceed the statutory number.[3] The trust must be so limited that in every possible contingency it will terminate as the law prescribes.[4] "If there is a possibility that the event upon

[1] R. S. Part II, Ch. 1, Tit. 2, § 24.

[2] Genet *v.* Hunt, 113 N. Y. 158, 166.

[3] Hawley *v.* James, 16 Wend. 120, 178, 222, 227; Fowler *v.* Depau, 26 Barb. 224.

[4] Brown *v.* Evans, 34 Barb. 594; Hawley *v.* James, 16 Wend. 121; Tayloe *v.* Gould, 10 Barb. 398; Hannan *v.* Osborn, 4 Paige, 342; De Barante *v.* Gott, 6 Barb. 492, 502; Yates *v.* Yates, 9 Id. 346. In determining the validity of the limitation depends on its character at the time of creating it, and not on

which a limitation is made to depend may exceed in point of time the period authorized by law, that is a fatal circumstance.[1] A limitation is effectual only when it must of necessity take effect within the compass of two lives in being at the testator's death."[2] Thus, a testator devised all his property to his son, provided he ever had lawful heirs who should attain the age of twenty-one. If he had none, then the property was to be divided equally between the children of the testator's brothers and sisters. As the son "might have had any number of children," remarked the judge, the title to the property would be suspended, not only during his life, but during the life of each of his children who should die before reaching the prescribed age. Not until one of them attained his majority would the suspension cease. The statute clearly forbids the creation of such a limitation. In Craig *v.* Hone[3] a trust was created for twenty-one years; and the trustees after the expiration of this period were endowed with discretionary authority to apportion and sell the property. The trust was invalid because its duration was measured by years instead of lives. Though the term might not extend beyond two lives, the uncertainty in this regard, so

subsequent events. As Judge Emott has remarked: "If the estate created is such as by its terms to suspend the ownership of the property for more than two lives in being it will be void, although in the subsequent history of the estate or the parties in interest, it may happen that this limit is not exceeded." Brown *v.* Evans, 34 Barb. 594, 605. "In determining the validity of limitation of estates, under the above statutes, it is not sufficient that the estates attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period, if such events might so happen that such estates might extend beyond such period. In other words, to render such future estates valid, they must be so limited that in every possible contingency, they will absolutely terminate at such period or such estates will be void." Grover, J., in Schettler *v.* Smith, 41 N. Y. 334; Knox *v.* Jones, 47 Id. 389, 397; Haynes *v.* Sherman, 117 Id. 437; Burrill *v.* Boardman, 43 Id. 259; Amory *v.* Lord, 9 Id. 415.

[1] Craig *v.* Hone, 2 Edw. Ch. 561.

[2] Surrogate Rollin, Matter of Russell, 5 Dem. 392. [3] 2 Edw. 554.

the vice-chancellor declared, and the possibility that it might endure for a longer period, was a fatal objection.

105. Again, if an alternative estate is created, depending on two events, one of which is to too remote, and the other is not, it is valid if it can take effect on the happening of the nearest event. In such a case subsequent events must be regarded in determining the validity of the limitation.[1] But if a suspense is illegal in both alternatives the estate is void.[2]

106. A novel question was raised in Purdy *v.* Hayt,[3] illustrating somewhat the principle under consideration. A testator gave his farm to his sisters, J. and C., "during their respective lives," and after their death it was to be sold and the income of the proceeds was to be paid to his neice during her life. It was contended that the disposition to the neice was invalid because two life estates proceded it, which was all the law permitted. But the court held that as the sisters were tenants in common, the sister who died last held her portion for only one life, and, therefore, the neice was entitled to the income arising from the proceeds of her share.[4] The suspense for the other share was unlawful. But it was not known until the death of one sister which share was unlawfully limited. The contention, therefore, was as the share unlawfully suspended could not be ascertained until one of the life estates was spent, the remainder was wholly defeated. But the court held that it was not.

107. Passing from the rules which have been established to determine the lives during which a trust may exist, we shall proceed to review the cases in which their observance has been questioned. In Parks *v.* Parks,[5] the testator gave to his wife the income from the largest part

[1] Fowler *v.* Depau, 26 Barb. 224.
[2] Dodge, Executor, *v.* Pond, 23 N. Y. 69, 70, 79.
[3] Orphan Asylum *v.* White, 6 Dem. 201.
[4] 92 N. Y. 446, 457, [§§ 145, 295.
[5] 9 Paige, 107.

of his estate during her life or widowhood; and after her death or re-marriage he gave to his five children in severalty the income of specific portions of the same property for life, and the remainders-in-fee of the same portions to the issue of the children who had taken the life estate therein. If any child died without issue, his or her specific portion was to go to the surviving brothers and sisters in fee. The chancellor declared that though the testator had created a trust to carry these purposes into effect, none was necessary. Had none been created the power of alienation of each separate portion of property would only have been suspended during the life of the child of the testator to whom the remainder for life was limited. "For, upon his or her death, even during the life of the widow, the remainder-in-fee, either in the issue or in the surviving brothers and sisters, would become immediately vested in interest, so that such ultimate remaindermen, by joining with the widow, could at once convey an absolute fee to the purchaser in that portion of the estate. And in respect to every other portion of the estate it would only remain inalienable during the continuance of the life of the child upon whose death the ultimate remainder in fee was limited to vest in interest. In the second case, the trust to receive the rents and profits and pay them over to the widow during her life or widowhood, and then to the specified child for life, could only suspend the power of alienation in each separate portion of the estate for the lives of the widow and the child. * * For the ultimate remainder-in-fee must necessarily vest in possession, as well as in interest, at the termination of those two lives in being at the death of the testator."

108. In Bolton *v.* Jacks[1] the testator gave the use of

[1] 6 Rob. 166.

one-third of his real estate to his wife for life, and the use of the rest to his two daughters during their lives. If they did not attain majority, then the use of their portions of the real estate was given to A., subject to the use thereof by the testator's wife during her life. It was claimed that her life estate was void because it suspended the absolute power of alienation for more than two lives in being at the creation of the estate, that is, the death of the testator. It was true that before the title to the land could be vested in A. three persons must die, the wife and two daughters. His estate, therefore, was clearly invalid, but by cutting it off the other was as clearly within the law.

109. In Knox *v.* Jones' the income of the testator's property (which was personal) was to be paid to A. during his life, and afterward to B. and C. equally during their lives, and after their death the estate was to pass into the possession of C.'s children; but if C. died without children, then the estate was to pass to Columbia College. The trust was clearly invalid, for it was run through three lives.[2]

110. In another case[3] the testatrix left seven children who were married and had children. Her residuary estate was given to trustees who were to pay over the income to her children while they lived, and after their death to their respective wives or husbands during their lives, or until they should re-marry. The will then provided that if any of her children should die without issue, or without leaving *a* husband or wife, then his or her share was given to the survivor. The executors were

[1] 47 N. Y. 389.

[2] See also Wood *v.* Wood, 5 Paige, 596; Amory *v.* Lord, 9 N. Y. 403; Schettler *v.* Smith, 41 Id. 328; Gott *v.* Cook, 7 Paige, 521; Van Vechten *v.* Van Veghten, 8 Id. 104.

[3] Van Brunt *v.* Van Brunt, 111 N. Y. 178.

also authorized to sell the estate and invest the proceeds. The trust was declared valid. The husband or wife mentioned in the will referred to those living at the death of the testatrix, and not any husband or wife.[1]

111. In Vail *v.* Vail[2] the income from the real estate was to be used to support and educate four minor children until they respectively became twenty-one, or were married. This created an illegal suspense. In a recent case[3] the testator gave one-third of the net income of his real estate to his wife for life and after her death to his two sons for life. The trust for the payment of the income was to continue on the death of either son for the benefit of his children till the death of the other. Then the property was to be equally divided among the testator's grandchildren. The trust suspended the alienation of the real estate for three lives, and was therefore illegal.

112. In Giraud *v.* Giraud[4] the testator at first limited the trust to the lives of two sisters, though creating it for the benefit of several. Had he attempted nothing more it would have been valid, but afterward he extended the duration of the trust with respect to the larger portion of his property until the death of his mother and three sisters. By so doing he violated the law.

113. In O'Brien *v.* Mooney[5] the testator directed his trustee to pay over the income from his real estate to his father during his life, and after his death to pay an annuity of three hundred dollars from the income to his

[1] The lower court declared that no unlawful suspension had been created because the executors had authority to sell, but this doctrine did not receive the assent of the court of appeals. In Tiers *v.* Tiers, 98 N. Y. 568, the testatrix limited a trust-term for the life of any widow of her three sons in the event of his dying without issue. This was an invalid limitation.

[2] 4 Paige, 317, 328.

[3] Storm *v.* Storm, 4 N. Y. State Rep. 670, affd. 113 N. Y. 646.

[4] 58 How. Pr. 175.

[5] 5 Duer, 51.

mother during her life, and the residue of the income to his sister during her life. After the death of the three, he made other bequests of his property, but these were declared invalid as the gift to the three above mentioned suspended the power of alienation as long as the law permitted.

114. In Shipman *v.* Rollins[1] the testator directed the executors to pay a portion annually of an investment to A., and another portion to B. during life, and the remainder of the income to an association unless the testator's sister became a widow. In that event the remainder was to be paid to her during life. After the death of the three legatees the principal was to be paid to an association. The bequest both of the principal and the income was void, for the power of alienation was suspended during three lives.

115. In Van Vechten *v.* Van Veghten[2] the trust was to lease, sell and convey the estate, and apply the income during four lives, and was void. Likewise in Jennings *v.* Jennings[3] a trust was created for maintaining and educating four infants, with a provision for accumulating a surplus and a division of the fund as they successively became of age, when each beneficiary was to receive his portion. As this might suspend the power of alienation beyond the termination of two lives in being, it was void. And another devise of real estate for the benefit of four minor children, which was not to be sold or divided till the youngest survivor became of age, and if either died his share was to be divided among the survivors, was declared void for suspending the power of alienation too long.[4]

116. If a trust should be created for the purpose of applying the income to the support of a widow during

[1] 98 N. Y. 311. [2] 8 Paige, 104. [3] 7 N. Y. 547.
[4] McSorley *v.* Leary, 4 Sand. Ch. 414.

life, and to minor children until they became of age, this might suspend the power of alienation beyond two lives, and would, consequently, be invalid. In such a case, the acting surrogate, said: "If there is a possibility of the limitation extending over the lives of any two of them, it is void. That possibility exists."[1]

117. In Rogers *v.* Tilley[2] the trust-maker conveyed his land by deed to R. in trust, who was to receive the income and apply it to the use of the trust-maker's wife and children during his life, and after his death was to convey the fee to his children. This trust created a suspension of alienation only during the trust-maker's life.

118. In Bean *v.* Hockman[3] the trustees were to receive the rents and profits of land so long as the wife of the creator of the trust lived, and after her death the daughter was to have part of them, and the remainder was to be used in freeing the land from indebtedness. After accomplishing this, they were to continue to receive the rents and profits and divide them among his children and the issue of any that might be dead, yearly and until all the issue then living of his children should become twenty-one. This trust created an illegal suspension, for it covered not only the life of his wife, and his daughter, but all the minorities of his grandchildren.

119. A testator devised his land to his widow for life and the remainder to his nephew. The testator's widow married A., and the nephew conveyed his remainder in trust to B. for A.'s sole use during his life in case that he survived his wife; and directed that in the event of her sickness or inability, and that more than the use of the land should be needed for her support, B. might sell enough to support her, and after her death and her hus-

[1] Scott *v.* Monell, 1 Red. 431, 439. Citing among other cases, Tayloe *v.* Gould, 10 Barb. 388.

[2] 20 Barb. 639.

[3] 31 Barb. 78

band's, the land then unsold should go to the heirs of the nephew and B. in equal parts. The trust was valid, and it operated to enlarge the intermediate estate by extending it to two lives instead of one. But on their death, the remainder became vested in the children or heirs of the nephew and B., the trustee, and therefore the suspense of the power to alienate it was not too long.[1]

120. In Ward *v.* Ward[2] the trust-maker gave the income of his real estate to his wife, and after her death to his two sons, share and share alike, and on their death "to their heirs, should both have heirs, their father's portion only, * * and in case of one having no heirs, then to the heirs of the other; * * and if both shall have no heirs, as the law directs." As the property could not be sold during the life of the wife and two sons, the limitation was too remote, and failed.

121. If a trust in real estate be created for the benefit of three or more minor children, and the trustees are endowed with discretionary authority to sell the same after the first child becomes of age, the trust is nevertheless invalid, for "the statute has given lives as the measure and nothing else."[3]

122. In Amory *v.* Lord[4] the testator's wife was to have the income of his real estate for life, or during widowhood, and then it was to be enjoyed by his children as tenants in common, and afterward by their husbands or wives during their lifetime. After their death the grandchildren of the testator were to have the fee. Notwithstanding the children were to have the income as tenants in common, there was a possibility that the trust with respect to each portion would continue through three lives;

[1] King *v.* Whaley, 59 Barb. 71.
[2] 105 N. Y. 68.
[3] Bronson, J., in Hawley *v.* James, 16 Wend. 171; Thompson *v.* Clendening, 1 Sand. Ch. 387.
[4] 9 N. Y. 403. See review of this case in Harrison *v.* Harrison, 36 Id. 548.

first, the life of the widow; second, the life of a child, and third, the life of the wife or husband of such child. The trust, therefore, clearly transgressed the statute.[1]

123. In Gott *v.* Cook[2] the testator created a trust for the benefit of two nieces. Each was to have an equal amount of the income, but if either died without children the survivor was to have the whole of it. The provision for giving the whole to the survivor was valid, but the other provision for giving to the children of the niece who died first an interest in their mother's share during the minority of the youngest child was void because it might have the effect of suspending the absolute ownership of the property beyond the life of the second niece, and with her death the legal period of suspension would be exhausted.

124. In Van Nostrand *v.* Moore[3] the testator's intention was contradictory. From some provisions in his will he evidently sought to create an express trust which was to continue until the death of his last surviving child. By another provision he declared that the issue of each child should on his or her death succeed to the proceeds of a sale or share corresponding with such child's income. Either intention was an attempt to create an invalid trust.

125. In Surdam *v.* Cornell[4] the testator gave his real estate to his widow for life and after her death to his six children "share and share alike * * during the terms respectively of their natural lives," and on the death of the child "the share of such child" was given to his or her heirs "in fee forever." In the concluding clause he declared that his intention was that his widow should have a life estate in the land, and after her decease that each of his then living children should have a life estate

[1] But it was declared valid for the widow's life. See § 116.
[2] 7 Paige, 521. [3] 52 N. Y. 12. [4] 116 N. Y. 305.

in the same, and at their decease their children, if any, should hold the same in fee. The testator's intention was declared to be the giving of successive life estates, first, to his widow in the entire real estate, and then, to each child one-sixth part with the remainder in fee to his or her heirs. Consequently there was no suspension in any part of the land for more than two lives.

126. In the matter of Russell[1] the testator was to pay from the income of the personal estate a life annuity to A. and B. respectively, and the balance to C. If A. and B. died their annuities were to fall into the income payable to C., and on the latter's death the principal was to be divided among several persons. As the trust must endure for the three lives it was clearly invalid.

127. In Van Cott *v.* Prentice[2] the income of a trust was to be devoted after the death of the settlor to the use of four beneficiaries, and the principal was to be paid to them when the youngest came of age. This was a lawful trust, for it was to endure only two lives, the life of the settlor and that of the youngest child, both of whom were in being when the trust was created. In McGrath *v.* Stavoren[3] a testator provided that the income of his land should be legally divided between his sisters during their lives, and on their death, if they should not marry and leave children, it was to go to the testator's nephews and nieces. This was a valid trust.

128. In Brewer *v.* Brewer[4] the trust was to continue until the death of the last survivor of the trust-maker and his daughters who might be living at his death, and and was clearly invalid.

129. A testatrix gave the income of her real estate to her three cousins in specified proportions, and if either of them died the share of such one was to be paid to the survivors for life. On the death of all of them the real

[1] 5 Dem. 388. [2] 104 N. Y. 45. [3] 8 Daly, 454. [4] 11 Hun, 147.

estate was to be divided into three equal parts and the children of each of the three cousins was to receive a part. This devise created an illegal suspense as "there was not intended to be any division until all the cousins were dead."[1]

130. A few more applications of the rule may be given. If a bequest should be to children who might be living at the expiration of ten years after the death of the testator's widow, and the descendants of those who might die before that time "to the exclusion of those *in esse* at the death of the testator," the bequest would be invalid.[2] If an estate should be created to begin after the termination of twelve lives, who are to receive annuities, it would violate the statute. Said Justice Miller, in such a case: "The right to the estate being thus held in abeyance during this period, and no estate being vested in any person by which authority was conferred to dispose of the same, it is very obvious that the power of alienation was suspended during the existence of the twelve lives named."[3]

131. Having completed a review of the cases containing a determination of the number of lives selected to measure the trust-term, we shall briefly consider one of the rules adopted in the beginning for determining the validity of these limitations. This is, that a limitation is void if by any possibility it may extend beyond the statutory period. Suppose the courts had adopted the opposite rule, that a

[1] Fowler *v.* Ingersoll, 2 N. Y. Supp. 833. See Vanderpoel *v.* Loew, 112 N. Y. 167.

[2] Converse *v.* Kellogg, 7 Barb. 590, 592.

[3] Hobson *v.* Hale, 95 N. Y. 610. The judge further remarked: "It will also be observed that the real point involved in this controversy is that a future estate does not arise until the determination of the period to be settled by the duration of the life of the last of the twelve annuitants. It is not the annuities which interfere and prevent the vesting of a future estate but the lives of the annuitants." Id. 612.

limitation is valid which may not possibly extend beyond the statutory period. Had this been done, many of these trusts which have been "dragged within the destroying arms of the statute"[1] would have been saved. Why did not the courts adopt this rule instead of the other? No statute or decision of their own courts stood in the way. They were not required to transplant and nourish the English rule. There was, indeed, a cogent reason for incorporating such a rule in the English system of law, for by that the power of alienation could be suspended during any number of lives at the creation of an estate. It was needful to restrict the right to suspend the power to alienate for so long a period, and a rigid application of the rule had this effect. But in New York the evil had been cured by the revisers and the legislature. The right of suspension had been restricted to two lives, or two lives and a minority. There was no need of going further. But the courts enforced the English rule of construction as though no statute had been passed.[2] Even Justice Cowen, who had the courage to dissent from the other two members of the supreme court in the James will case, vigorously contended for a strict construction of the statute.[3]

132. While the courts occasionally repeat the rule, in practice they have widely departed from it. By dividing trusts when they can do so without violating the main purpose of their creator, by giving a broad construction to the doctrine of tenancy in common and the meaning of powers, many a trust or other bequest has been saved which in the early days of administering of the law would have been pronounced invalid.

[1] Brady, J., in Vanderpoel *v.* Loew, 7 N. Y. State Rep. 306.

[2] See remarks of Savage, Ch. J., in Coster *v.* Lorillard, 14 Wend. 306, 307, 326, 327, and of Chancellor Walworth in the same case in 5 Paige, 225.

[3] Kane *v.* Gott, 24 Wend. 661.

SECTION V.

THE JOINT AND SEVERAL INTERESTS OF THE BENEFICIARIES.

133. When there are several beneficiaries, who are also term-measurers, the lawfulness of the suspense often turns on the answer to the question, are they joint tenants or tenants in common?[1] Of course, their present interest must

[1] "The difference," says Justice Finch, "between a joint tenancy and a tenancy in common is said to be that in the former there is unity of title and possession, and in the latter unity of possession without unity of title. The divisibility of rights does not inevitably involve a divisibility of actual possession at the moment when the rights accrue. The several rights may exist, although the actual possession under it, and in accordance with it, is postponed. As was said in Manice *v.* Manice, 43 N. Y., 303 a vested estate can exist in an undivided share as well as in a specific piece of land, and in Vanderpoel *v.* Loew, 112 Id. 180, the shares and interest are several, although the fund remains undivided." Hillyer *v.* Vanderwater, 24 N. E. Rep. 999, see 21 N. Y. 681.

be in the income, for every other present interest is in the trustee; but they may have a future interest in the estate from which the income is derived after the trust has ceased, consequently a joint tenancy or tenancy in common may exist among them with respect to either their present or future interest, or both. In other language, the beneficiaries may be joint tenants or tenants in common in the income; while those in whom the estate vests after the termination of the trust, whether beneficiaries or other persons, may hold it in the same manner. In Delafield *v.* Shipman,[1] the income of real estate was given in trust to be applied for the support of the testator's widow, keeping the house in repair, and other objects, and the residue for the support of his children and their mother, in equal shares. They took the surplus income, not as a class, not as joint tenants, but distributively as tenants in common. Said the court: "Such language is always held to constitute the beneficiaries tenants in common, and to show that they take distributively, unless there is something in other provisions of the will to show that the testator intended that they should take as a class."

134. By statute, every estate granted or devised to two or more persons in their own right is a tenancy in common unless expressly declared to be a joint tenancy.[2] Another statute has existed since 1786 embodying the same principle.[3] By these statutes the common-law rule has been abrogated, and a devise to two persons is presumed to create a tenancy in common, which is overthrown only by an express declaration that they are to take as joint tenants,[4] "or by words from which it clearly

[1] 103 N. Y. 463, 468.

[2] R. S. Part II, Ch. 1, Tit. 2, § 44.

[3] 1 Greenl. 207, § 6.

[4] Gage *v.* Gage, 43 Hun, 501; Purdy *v.* Hayt, 92 N. Y. 452–454; Mott *v.* Ackerman, Id. 539, 549; Everitt *v.* Everitt, 29 Id. 39; Hillyer *v.* Vandewater, 24 N. E. Rep. 999.

appears that there is an intention to create a joint tenancy; and nothing less than this will do it."

135. Many of the trusts have been quite similar to that in De Peyster *v.* Clendining,[1] in which the income of the land was given to the beneficiaries during one life, the widow, and then the land was to be sold and the proceeds divided equally among the beneficiaries, who were the children of the trust-maker, and if one of them died then his share was to go to his issue, or, if having none, to the surviving brothers and sisters.[2] In such cases the land and the proceeds have been regarded as held in trust for only two lives, and therefore the trust did not create an excessive suspension.[3]

136. In Clancy *v.* O'Gara[4] the proceeds of the estate were to be put in a bank, and at the end of fifteen years divided among four children, who were named, share and share alike. Each fourth vested in each child on the death of the trust-maker as tenants in common. If the division could not have been made until fifteen years after the testator's death an illegal suspension was created. But the gift was saved because it was not only vested when the testator died, but each share was determined by the death of the donee. In no case was the division postponed beyond fifteen years, and was to be made sooner if the donee died before. The gift was, therefore, for only fifteen years, or at most for a single life. In Dickie *v.* Van Vleck[5] the trus-

[1] 8 Paige, 295.

[2] There were additional features to this trust, but they were cut off.

[3] In the matter of Blaker, 12 N. Y. State Rep. 741, the testator gave the widow the use of some property during her life, and after her death to several children as tenants in common, and on the death of each child his share was to be equally divided among his children. This disposition of the testator's property created no illegal suspension.

[4] 4 Abb. N. C. 268.

[5] 5 Red. 284.

tees were to pay one-sixth of the net income quarterly to each of the six descendants of the trust-maker for life, and on the death of any one of them, to transfer his share absolutely to his issue, or in default of issue, to the survivors and their representatives. This was a suspension for only one life, that of each beneficiary, as the gift was to each in severalty. In Tiers *v.* Tiers[1] the testator directed the trustees to divide her estate into six equal parts, and to lease four of these and collect and pay over the income to four of her children, who were named, and on the death of either, his share or part was to be conveyed to his children when they arrived at the age of twenty-one years. This was a valid devise to them whatever might be the destination of the limitations in the event of their decease.

137. In Hunter *v.* Hunter[2] a testator devised to his wife, her heirs and assigns, his land in trust, to receive and apply the income to the use of his seven sons and daughters equally during their lives. This trust did not suspend the power of alienation beyond the statutory limit. The trust estate was inalienable for only one life, that of the devisee and trustee. "If," said Justice Sutherland, "it should be considered that the devise is in effect, as it is in form, a devise to the wife in fee simple, subject to the trust, and that the trust will not wholly cease until all the *cestuis que trust* shall have deceased; even upon that construction I am not prepared to say that the trust or devise is void. If, as the *cestuis que trust* successively die, one-seventh of the trust estate is freed from the restraint on its alienation produced by the trust, will, or can, the alienation of any part or portion of it be restrained by the trust for more than one life?"[3]

[1] 98 N. Y. 568. [2] 31 Barb. 334, 338.

[3] The court, citing Savage *v.* Burnham, 17 N. Y. 561; Mason *v.* Mason's Executors, 2 Sand. Ch. 432.

138. A devise of land to trustees in trust to permit M., so long as she should live, or during the minority of her youngest child, to enjoy the rents and profits of the land for her benefit and the maintenance of the children, and directing that after M.'s death, or when the youngest child attained the age of twenty-one, the land should be sold or divided equally between M. and the testator's children then surviving, was not void as an illegal suspension of the power of alienation. This was only a trust for M.'s life, or for a shorter period if the youngest child became twenty-one before M.'s death.[1]

139. In the case of Shepard *v.* Gassner[2] the testator gave his real estate in trust during the lifetime of his wife and his daughter R., to apply the income to the use of his wife while she remained his widow, and if marrying, a fixed sum to her use annually, and the remainder equally to the use of his children, and on the death of his wife and his daughter R., to sell and divide the proceeds of the estate equally among his children then living. This was a valid trust, for it was to continue only during the lives of his wife and daughter, though other beneficiaries were to share in the income and principal if his wife married.

140. In Thorn *v.* Coles[3] the testator directed his executors to invest one hundred thousand dollars in real estate and to divide the income among his eight children, or the survivors of those who should die during their respective lives. They were not to dispose of their shares without the consent of a majority of the executors. The shares of the children who died were to go to their children and be equally divided among them. This trust suspended the power of alienation too long, "it being clearly intended by the will, that the estate

[1] Stewart *v.* McMartin, 5 Barb. 438.

[2] 41 Hun, 326.

[3] 3 Edw. Ch. 330.

so to be purchased should be kept entire until the death of the longest liver of the eight persons. * * * If, in making the investment," continued the vice chancellor," the executors were at liberty to take the title to themselves in equal undivided eighth parts for each child, in trust, to apply the rents and profits to each for life, and, at the death of any one child, to convey such share of the estate to his or her children in remainder-in-fee, so as to render such share then devisable from the rest and alienable, or if they could take the title to the eight persons as tenants in common for life in equal shares, with remainder-in-fee of each undivided share to the child or children of any one dying or to their survivors in case of death of either childless—so that, upon the termination of the respective life estates, the remainder in such share might vest and the property be partitioned or the respective shares be sold in fee, then the difficulty would not exist."

141. In Gage *v.* Gage[1] the testator, after devising to his wife for her life the use and income of his land, at her decease devised the same to his son and daughter "for their use and benefit during their natural lives," and at their death "to their heirs forever, to be equally divided between them, share and share alike." This was a valid devise, for the children took as tenants in common, and consequently the suspension was for only two lives.[2]

142. In Van Brunt *v.* Van Brunt[3] a testatrix provided that if any of her children should die leaving issue, "said issue" should represent their parents *per stirpes* and not *per capita*, and receive their parent's share of the income after the death or re-marriage of their surviving

[1] 43 Hun, 501.

[2] See, also, Campbell *v.* Rawdon 18 N. Y. 412, and Mott *v.* Ackerman, 92 Id. 539.

[3] Van Brunt *v.* Van Brunt, 111 N. Y. 178.

parent until they became of age, when their interest should be given to them. It was held that on the death of any child, and of the husband or wife of that child who was living at the death of the testatrix, the portion of such child vested at once in his or her children, each one of whom taking his or her proportion in fee, subject only to the postponement of possession during his or her minority, and to the execution of the trust during that period; and there was no unlawful suspension of the power of alienation; the fact that the issue of each child were to take *per stirpes* did not make them joint tenants but tenants in common.

143. In Stevenson *v.* Lesley[1] the testator gave the residue of his estate in trust for the benefit of his grandchildren and their survivors, share and share alike, which was to be paid and conveyed to them respectively when they attained their majority. The trustees, by this will, took the legal title to the residuary estate by separate trusts in favor of each grandchild, and each of them took a vested remainder-in-fee in his share expectant on the termination of the trust at his majority.

144. In Bliven *v.* Seymour[2] the testator gave to his daughter A. the use of one thousand dollars, and directed that if she died leaving children, then they were to have the use of the money. It was contended that the testator attempted to create an express trust and that A.'s children took as a class and not in severalty because no separate shares were specified. But the court answered that when a life estate is given to a widow and the remainder to the children, which vests at the testator's death, they take as tenants in common. "Such is the express provision of the statute as to a grant or devise of real estate and the same rule is applicable to a bequest of

[1] 70 N. Y. 512. [2] 88 N. Y. 469, 477.

personalty and must be so applied."[1] A.'s children, therefore, living at the death of the testator, took distributively, and the share of each vested at once, subject to the mother's life estate, and of which they would be divested by death during her lifetime.

145. Purdy *v.* Hayt[2] is an instructive case. A. gave his real estate to his sisters B. and C. "during their respective lives," and after their death directed that it should be sold and the proceeds be invested and the income be paid by them to D. "during her life, and at her death the principal to be divided equally between any children she may leave," and in the event of her "not leaving lawful issue," the principal was given to others. The sisters died, B. first, and then the executors sold the real estate. D. was living and had two children. The court decided that B. and C. (1) had a life interest in the land with cross-remainders; that (2) they were tenants in common, each taking a distinct estate for life in the land; that (3) the remainder given to D.'s children was contingent; that (4) on B.'s death and the termination of her life estate a second life estate vested in C. and on her death the limit of suspension to that share, which was first held by B. was reached, and consequently the third life estate therein to D. was void. The devise, however, of C.'s share to D. was valid, because only one life estate had run therein previous to D.'s enjoyment of the same. She therefore was entitled to the income of one-half of the proceeds of the sale during life, and the remainder to her children was valid.[3]

[1] Everitt *v.* Everitt, 29 N. Y. 72. [2] 92 N. Y. 446.

[3] See remarks of Rumsey, J., on this case, in Gage *v.* Gage, 43 Hun, 503. In Campbell *v.* Rawdon, 18 N. Y. 412, a testator devised to his sons A. and B. and his housekeeper C. a life estate in his land and the remainder "to the heirs of" C. These three were tenants in common. See Orphan Asylum *v.* White, 6 Dem. 201, and opinion of Earl, J., in Hillyer *v.* Vandewater, 24 N. E. Rep. 1004.

146. In Tucker *v.* Bishop[1] one-half of the income of the trust estate was to be shared equally by the children of the testator's grandson, and when any child became twenty-one he was to have his proportion of one-half of the principal of the estate. The children of the granddaughter were to share the other half of the income and principal of the estate in the same manner. The court held that each of the children of the grandson who were living at the time the testator died took an equal immediate vested interest in one-half of the principal, and so did the children of the granddaughter. The share of each child of the grandson, however, was subject to a dimunition in quantity by the birth of subsequent children before the first distribution, or before the first child attained majority, and the same principal applied in distributing to the granddaughter's children. Nor did the uncertainty of the quantity of their interest, by reason of possible additions to their number, suspend the power of alienation. Said Justice Paige: "The uncertainty of the quantity of the interest of the children *in esse* at the death of the testator, growing out of the possible dimunition of their shares by subsequent births, could not have the effect of suspending the power of alienation. Whatever interest the children *in esse* at the death of the testator had in the fund at any time prior to the majority of the child who first attained twenty-one, whether diminished in quantity by the augmentation of the members of the class or not, was susceptible of alienation by a next friend or guardian, acting under an order of the court. Expectant estates are now alienable in the same manner as estates in possession."[2] Besides, if the uncertainty of the quantity of the interest of the children *in esse* at the death of the testator could operate in suspending the power

[1] 16 N. Y. 402, 406.

[2] R. S. Part II, Ch. 1, Tit. 2, § 35.

of alienation, the suspension could not exceed the continuance of more than one life in being at the creation of the estate," that of either the grandson or the granddaughter.[1]

147. In Monarque *v.* Monarque[2] the testator gave successive life estates, first to his wife, and then to his daughters, and the remainder in fee to their children. The income devised to the daughters was embraced in a single clause and was "to be divided between them, share and share alike, during their and each of their respective natural life, and remainder to their respective children, and to their respective heirs and assigns forever." The court, speaking through Justice Andrews, remarked: "The gift of the income * * to his daughters for life was equivalent to a devise to them of a life estate in the land. But the devise to the daughters for life, although embraced in a single clause in which all are named, is, by the well-settled construction of similar clauses, a devise to each in severalty of a life estate in one-fourth part of the property.[3] The consequence is that on the termination of the life estate of the widow, and the death of any daughter of the testator leaving children, the remainder in fee as to the one-fourth part would immediately vest in possession in such children." The absolute power of alienation, therefore, was not suspended beyond the period of two lives in being at the death of the testator.

148. It is true that in the Monarque case no express trust existed, and in two of the cases cited by the court,[4] the trustees were directed to convert the real estate into personal property, and distribute the income, and pay the

[1] See criticism on this case by Earl, J., in Hillyer *v.* Vandewater, 24 N. E. Rep. 1008.

[2] 80 N. Y. 320, 324.

[3] Savage *v.* Burnham, 17 N. Y. 561; Everitt *v.* Everitt, 29 Id. 39; Stevenson *v.* Lesley, 70 Id. 512.

[4] Savage *v.* Burnham, 17 N. Y. 561, and Everitt *v.* Everitt, 29 Id. 39.

principal as directed by the will, and therefore the statute under consideration did not apply to them, but Stevenson *v.* Lesley[1] was a real estate trust. In that case the testator gave his residuary estate in trust to his son's grandchildren, and the survivors of them, share and share alike, and his daughter's children, and the survivors of them, share and share alike, to be paid and conveyed to each child respectively, when he became of age, in equal shares; and in the meantime the income was to be applied by the executors to the necessary support and education of the children. The court determined that the estate was vested in the trustees in separate shares, and by separate and several trusts for the benefit of the grandchildren, who were living at the time of the testator's death, the trust for each share terminating when the beneficiary became of age; that each of the surviving grandchildren took a vested remainder in his share, which was to be enjoyed as soon as the trust ended, or, in other words, when he attained his majority. The devise, therefore, did not suspend the power of alienation beyond the minority of a beneficiary, and was valid; and if any beneficiary should die before the event, his share would be liberated from the trust and pass absolutely to his heirs and personal representatives. The further remark may be made that a child of the testator's son who was born after the testator's death, but before distributing the body of the estate, was declared to have a share therein. Justice Andrews, who delivered the opinion of the court, said: "The intent of the testator in the will in question to devise the residuary estate to his grandchildren in shares, and not as an entirety, thereby creating a tenancy in common, and not a joint tenancy, is denoted by the use of terms appropriate to create a tenancy in common. The

[1] 70 N. Y. 512.

residuary estate is devised to the trustees in trust for the grandchildren, 'share and share alike,' 'and is to be paid and conveyed to each of said children respectively, as they each become of age, in equal shares.' This language clearly creates a tenancy in common, without the aid of the statute provision upon the subject. The direction that 'in the meantime'—*i. e.*, until the termination of the trust—the income of the estate shall be applied to the support of the grandchildren, under the care of the executors, is not inconsistent with an intent to devise the estate in shares. This language, in view of the other parts of the devise, may and should be applied distributively, as if it directed the income of each share to be applied to the use of each beneficiary, respectively. Under the will the trustees took the legal title to the residuary estate, upon separate and several trusts, in favor of each of the nine grandchildren of the testator, and each of the grandchildren a vested remainder in fee in his or her share expectant upon the termination of the trust at his or her majority. The trusts are not, it is true, separately framed, but the interests of the beneficiaries being given in shares, the separate and distinct character of the trust provision necessarily results."

149. In Savage *v.* Burnham[1] the testator devised his real and personal estate in trust. The real estate was to be sold after the death of the widow, but while living she was to receive for her own use one-third part of the clear yearly rents and profits of the real estate, and the residue was to be deemed a part of the personal estate and subject to the same dispositions. These were (1) to apply the income to the maintenance and education of six sons and four daughters named in the will, equally, until the sons should become twenty-one, and the daughters should re-

[1] 17 N. Y. 561

spectively attain that age or be married, and (2) to pay or transfer the principal in equal shares to the sons and daughters. The shares of the sons were to become vested at twenty-one, and then to be paid or transferred; and the shares of the daughters were to be vested in the trustees and the income was to be paid to them during life, and on the death of each daughter her share was to go to her issue, if leaving any. This trust was declared valid for the purpose of receiving and applying the rents and profits of the real estate, and also for the purpose of selling the land for the benefit of the legatees, for the power of alienation was suspended only during the life of the widow. As the land was then to be converted into personal property, and the income applied to each child, though the whole estate was administered under one trust, its validity was not affected by this statute.[1]

150. In Coster *v.* Lorillard[2] the trustee was to divide and pay over the rents and profits among the twelve nephews and nieces of the testator "during their natural lives, and to the survivors and survivor of them, to be divided equally between them or such of them as should from time to time be living, share and share alike. The annuities or distributive shares of the several nieces and grandnieces of the testator to be paid to them for their separate use and benefit, free from any control, liabilities or engagements of their husbands." Chancellor Walworth sought to sustain the trust on the ground that the beneficiaries were tenants in common with cross-remainders, but the court of errors did not agree with him. The proposition can hardly be questioned that the words "to be divided equally," "share and share alike," "to and among," and others of similar import, standing alone in a

[1] For other cases of tenacy in common see Smith *v.* Edwards, 88 N. Y. 92, 103; Everitt *v.* Everitt, 29 Id. 71.

[2] 14 Wend. 265.

will, indicate a severance of the estate devised, and establish a tenancy in common. Justice Nelson fully illustrated that the words used in the Lorillard will were quite sufficient to establish a tenancy in common if the testator had not plainly intended a survivorship, which is the principal incident of a joint tenancy. But survivorship is an element of a cross-remainder and the construction, therefore, given by the chancellor squared as fully with the intention of the testator as the construction by the court of errors. The chief justice did indeed ask, when reviewing the argument of the chancellor, if it was not the intention of the revisers and legislature to abolish all such fictions "with which this branch of our jurisprudence has been overloaded,"[1] nevertheless, cross-remainders were not abolished, and the existence of such an estate has been clearly recognized in the subsequent administration of the law. In Purdy *v.* Hayt[2] Justice Andrews declared that the raising of the cross-remainders by implication was not unusual, and when it was justified by the language of the will, and would accomplish the purpose of the testator, it was the duty of the court so to construe the will as to give effect both to the statute and to the intention.[3]

151. It is true that at common law Lorillard's children were joint tenants, but the statute of 1782 abrogated or reversed the common-law rule. Why, then, should the court have given that long review of common law authori-

[1] Coster *v.* Lorillard, 14 Wend. 315. [2] 92 N. Y. 452–454.

[3] In that case the testator gave his farm to his sisters, J. and C. "during their respective lives," and after their deaths it was to be sold, etc. Andrews, J., said that it was the manifest intent that the surviving sister should have the use of the whole farm after the death of the other, but this purpose could be accomplished without construing the original estate in the two at a joint tenancy. "There seems to be no objection to a limitation to two as tenants in common for life, and of the share of the one first dying to the survivor for life." See Knox *v.* Jones, 47 N. Y. 398.

ties[1] to show that a joint tenancy existed, for they had not the most remote application. Without question they were joint tenants at common law. It could also be clearly implied from the testator's language, but the statute was enacted to prevent such a construction. Only when a joint tenancy is "expressly declared," not implied, is a joint tenancy created. It seems to us that the courts ought to have given the fullest force to that statute, and not to have narrowed it by permitting joint tenancies by implication, however clear this might be. More than a hundred years before Lord Chancellor King had said that "joint tenancy was an odious title in equity,"[2] and Chancellor Walworth's attempt to administer the statute in the spirit and with the intent of its authors, and as more modern judges have done, ought to have been supported by the judges of his own time. Had this been done the Lorillard will would have been sustained, and perhaps the James will also, though there are some marked differences between them.[3]

152. The courts had hardly announced that decision however before they began to retreat.[4] Chancellor Walworth noted the movement, nevertheless, having failed in his "attempt to carry into effect the intention of the testator as far as was practicable, consistently with the rules of the law, by considering the share of each *cestui que trust* as a tenant in common in the rents and profits of the

[1] Fisher *v.* Wigg, 1 Ld. Ray. 622; Rigden *v.* Vallier, 2 Ves. Sr. 252; Hawes *v.* Hawes, 1 Id. 13; Clerk *v.* Clerk, 2 Vernon, 323; Barker *v.* Giles, 2 P. Wms. 280; Rose *v.* Hill, 3 Burr. 1881; Armstrong *v.* Eldridge, 3 Br. Ch. 215; Blisset *v.* Cranwell, 1 Salk. 226; Russel *v.* Long, 4 Ves. Sr. 551; 2 Black. Com. 182-187; 1 Co. Litt. 840, 845; 2 Cruise, 503, 504; Preston on Estates, 137; Coster *v.* Lorillard, 14 Wend. 336.

[2] Barker *v.* Giles, 2 P. Wms. 280.

[3] See remarks of Finch, J., on this statute in Hillyer *v.* Vandewater, 24 N. E. Rep. 1000.

[4] Darling *v.* Rogers, 22 Wend. 483.

real estate as a separate and independent trust" he followed that decision in the case before him.[1]

153. The strong tendency of the courts is to regard beneficiaries as tenants in common whenever such a relationship can be harmonized with the intention of the trust-maker. Says Justice Bradley: "In this country the policy and tendency is favorable to severalty in the ownership and enjoyment of property, both real and personal, and such effect will ordinarily be given to rights and interests in respect to it, unless a purpose to vest or hold it jointly is fairly indicated or required by construction, or by business relation or association for such purposes."[2]

154. Nor will the termination of a trust with respect to the several shares at different periods effect its legality. Indeed, in many cases not all of the shares vest at the same time. The trust-maker often provides that his children shall receive their shares when they reach their majority, and as this is a different date for each child, except in the case of twins or triplets, their shares vest at varying dates with a corresponding extinction of the trust. If the property is personal, as soon as a share vests it must be paid and the trust in this portion is ended.[3] In Meserole *v.* Meserole[4] there were fourteen tenants in common holding equal parts, and all terminating after the expiration of two lives in being at the time the testator died,

[1] Van Vechten *v.* Van Veghten, 8 Paige, 120.

[2] Matter of Lapham, 37 Hun, 18. In the recent case of Hillyer *v.* Vandewater, 24 N. E. Rep. 1003, Justice Finch, after recalling the statutory rule of construction, remarked: "In examining the later cases I have imagined that it has not always been given its due force, and that, as a consequence, we have sometimes (myself as often as any) borne heavier burdens in the endeavor to save the reasonable purposes of a testator than the necessities of the case required." When a devise is in severalty or is an entirety, see discussion in Field *v.* Field, 4 Sand. Ch. 546.

[3] Savage *v.* Burnham, 17 N. Y. 561, 570, 571; Everitt *v.* Everitt, 29 Id. 82–96; Hillyer *v.* Vandewater, 24 N. E. Rep. 999.

[4] 1 Hun, 66

but the proper execution of the trust required that some of the parts should be held by the trustees after the termination of the trust in them and the ultimate right had vested. Nevertheless, the trust was not thereby invalidated, Justice Daniels saying, that each beneficiary became, for the time being the equitable owner of that portion of the estate from which his rents or income was devised, and that the property held in trust to that extent was held solely for the person benefited by so much of the trust.[1]

155. In Gilman *v.* Reddington[2] the testator bequeathed the income of twenty-five thousand dollars to his wife. He also created a trust which was to terminate when two of his children died, or reached the age of thirty. The source of the above-mentioned sum was sure to become a part of the residuum, which formed a part of the trust fund, and which was to terminate as described. Now, suppose the widow survived the children, or lived after the termination of the trust, what became of her interest, or did the bequest create an illegal suspension of so much of the estate? "She will," said Justice Comstock, "nevertheless continue to be entitled to her interest, and, notwithstanding the general direction to pay over the estate to the parties ultimately entitled, it may be the duty of the trustees, in the event supposed, to retain these moneys under their control until her right to interest shall cease. * * The possession of these sums of money will be postponed until the widow's right to interest shall no longer

[1] In Savage *v.* Burnham, 17 N. Y. 561, 573, the testator's widow had a life-interest in one-third of the estate and then his children were to share it as tenants in common, and become vested therein when they attained majority. Some of them were of age when the testator died. Their shares therefore, were vested, yet the real estate could not be sold during the widow's life, or distributed. But this did not affect their vesting, or the legality of the testator's disposition of his property.

[2] 24 N. Y. 9, 17.

intercept its actual payment. Looking at the question then, as we must, from that point of time, the principal is in the nature of a remainder absolutely vested in interest, while the right to interest is in the nature of a present estate in the same sum of money. Now, a vested remainder in land is not in any sense inalienable, and a right in the nature of a vested remainder to money or personal estate is as absolute and perfect as any other right of property. The right now in question is perhaps still more analogous to a vested pecuniary legacy payable without interest at a future day. If gifts of that nature are held to create a suspension of absolute ownership, in the sense of the law against perpetuities, it would be necessary always to limit them in some form of life. A vested legacy, payable in three years or at any other period not depending on a life or two lives in being, would, in that view of the subject, be void. Plainly, such is not the rule of law."

156. In Hillyer *v.* Vandewater[1] the testatrix created a trust of her residuary estate, giving the income to her three daughters in equal proportions for ten years, and at the end of that period distributing the principal in the same manner. She made no provision for the division of either the income or principal in the event of the death of either daughter, thus leaving it to be determined by the rules of law. If one of them had died, therefore, the right to one-third of the income and property would have devolved on her heirs or next of kin. This would have immediately vested and been freed and discharged from the trust. Says Justice Finch: "It could not be otherwise. Every purpose of the trust as to that portion of the estate would be fulfilled and ended. The trust was to pay over rents and profits to the daughter, not to her successors.

[1] 24 N. E. Rep. 999, 1003.

They were not made beneficiaries of the trust, nor were the executors in any manner nominated or appointed as their trustees. The portion which devolves by death is necessarily freed from the trust by that event, and the executors hold that portion, not as trustees for such heirs and next of kin, but as tenants in common with them of such portion."[1]

SECTION VI.

DIVISION OF TRUSTS.

157. When a testator has erred in extending his trust through too many lives, his trust has often been saved by cutting off all in excess of the statutory number. Chief Justice Savage sought to establish this doctrine in the Lorillard case, in which the testator attempted to render his estate inalienable during twelve lives. This intent was contrary to law, but he could have done so for the lives of

[1] See remarks of Chancellor Walworth in Lorillard *v.* Coster, 5 Paige, 226.

two persons. It was the duty of the court, so contended the chief justice, to regard the testator's intention to that extent. His opinion, however, was not shared by the other members of the court. But since that time the courts have swung partly around. Justice Edmonds, who was a member of the court of errors when Coster *v.* Lorillard was decided, afterward remarked that it was well settled, notwithstanding the earlier cases, that any legal trust was sufficient to sustain a devise or conveyance to a trustee of an estate commensurate with such trust, without reference to the illegal trusts which the testator or grantor had attempted to create in the same estate.[1] "The statute is to be allowed to work out the destruction of the legal parts only when they would of necessity uphold the illegal parts with them."[2] Trusts may be divided and the legal parts sustained whenever no injustice would be done to the persons in interest, or other provisions may be eliminated which would create an illegal suspense.[3] In the language of Justice Earl, the courts may do "what the testator might in the emergency be presumed to wish."[4] Or in words of Chief Justice Denio: "If the purposes of a trust are separable, and some of them must arise within two lives, and there are others which must or may become operative only after the expiration of the two lives, the former may be sustained, but the later cannot."[5]

[1] Dupre *v.* Thompson, 4 Barb. 283, citing Hawley *v.* James, 5 Paige, 458; Darling *v.* Rogers, 22 Wend. 483; Gott *v.* Cook, 7 Paige, 521; Irving *v.* DeKay, 9 Id. 521, affd. 5 Denio, 646; Amory *v.* Lord, 9 N. Y. 419; Kane *v.* Gott, 24 Wend. 666.

[2] Dupre *v.* Thompson, 4 Barb. 284.

[3] Bolton *v.* Jacks, 6 Rob. 166.

[4] Kennedy *v.* Hoy, 105 N. Y. 134; Killam *v.* Allen, 52 Barb. 605.

[5] Post *v.* Hover, 33 N. Y. 593, 598; Grout *v.* Van Schoonhoven, 1 Sand. Ch. 336, 340; De Peyster *v.* Clendining, 8 Paige, 295, affd. 26 Wend. 21; Haxtun *v.* Corse, 2 Barb. Ch. 506. See DeKay *v.* Irving, 5 Denio, 646, affg. 9 Paige, 521; Vail *v.* Vail, 4 Paige, 317; Henderson *v.* Henderson, 113 N. Y. 14; Tilden *v.* Greene, 54 Hun, 231; Kane *v.* Gott, 24 Wend. 641, affg. 7 Paige,

But if a testator should wish his beneficiaries to share equally, or in some other clearly defined manner, and the setting aside of parts of his trust and the execution of the remainder would defeat this wish and cause an unjust division of his property, no portion of the trust would be sustained.[1]

158. Thus the doctrine of *cy-pres*, which Chief Justice Savage sought to apply in the Lorillard case, and which the courts have repeatedly attempted to destroy, survives, and under the name of "approximation," and which was first used perhaps by Justice Edmonds, or in no fixed terms or language, has grown in judicial favor. Its survival, notwithstanding all the attacks of bar and bench, is proof that it is just and must be permitted to live. The work of restoration was begun as soon almost as the judicial knife had been plunged into it; and the friendly hands who have nurtured the doctrine into a vigorous life have undoubtedly done wisely, as we shall see in the following review of its applications. It is true that the Chief Justice went further in applying the doctrine than any court

521; Kennedy *v.* Hoy, 105 N. Y. 134; Van Schuyver *v.* Mulford, 59 Id. 426; James *v.* Beasley, 14 Hun, 520; Parks *v.* Parks, 9 Paige, 107; Harrison *v.* Harrison, 36 N. Y. 543; Knox *v.* Jones, 47 Id. 389; Van Vechten *v.* Van Veghten, 8 Paige, 104, 119; Schettler *v.* Smith, 41 N. Y. 328; Manice *v.* Manice, 43 Id. 303, 384; Tiers *v.* Tiers, 98 Id. 568; Oxley *v.* Lane, 35 Id. 340; Shipman *v.* Rollins, 98 Id. 311, 330; Darling *v.* Rogers, 22 Wend. 483; Smith *v.* Edwards, 88 N. Y. 92; Woodgate *v.* Fleet, 44 Id. 1; Bean *v.* Bowen, 47 How. Pr. 306, 328; Woodruff *v.* Cook, 47 Barb. 304, affd. 61 N. Y. 638; Williams *v.* Conrad, 30 Barb. 524; Arnold *v.* Gilbert, 5 Id. 190; Murray *v.* Charlick, 23 N. Y. Week. Dig. 563; Killam *v.* Allen 52, Barb. 605; Leavitt *v.* Wolcott, 65 How. Pr. 51; Dupre *v.* Thompson, 4 Barb. 279, 284. In O'Brien *v.* Mooney, 5 Duer, 51, the court did not decide whether the trust was an entirety or not; in Andrew *v.* New York Bible and Prayer Book Society, 4 Sand. 156, the trust could not be divided. In Smith *v.* Edwards, 88 N. Y. 92, the gifts, valid and invalid, were not enveloped in a simple trust, there was no trust, but merely a power.

[1] Benedict *v.* Webb, 98 N. Y. 460; McSorley *v.* Wilson, 4 Sand. Ch. 515; Savage *v.* Burnham, 17 N. Y. 561; Knox *v.* Jones, 47 Id. 389.

has subsequently attempted, for he would have maintained the trust during the lives of two beneficiaries and cut off its duration during the lives of ten others in the same class, while in all the subsequent cases the sundering has rarely been in lives of the same class,[1] but rather in the elimination of classes, or, in more general language, in the separation of purposes, on the ground that if the intention of the testator could not be wholly preserved, it was desirable to do so in part, if thereby no injustice was done to those whose interests fell by such action.

159. In a recent case[2] Justice Van Vorst said there was no valid reason for condemning an entire trust when portions might be separated and disfavored, because contrary to the statute. "The valid portions of a trust and dispositions made in a will should be allowed to stand if it can be done without disrupting the whole scheme of the will or trust." Another case, and often mentioned, is Knox *v.* Jones[3] which was a trust of real and personal property. Although both kinds were given by the same clause of the will, and on the same trusts, they were severable, and the validity of one did not depend on that of the others. The real and personal property were entirely distinct, and effect was to be given to each trust, so the court said, without reference to the other. The intent was to create a trust in all the property, real and personal, for the benefit of the three individuals named, for their lives, and could be well executed as to a part, though it might fail as to another part of the property.[4] If a bequest is valid and the direction for its distribution is invalid, and the two things "are distinct provisions," the bequest

[1] See, however, remarks of Andrews, J., in Benedict *v.* Webb, 98 N. Y. 466.

[2] Leavitt *v.* Wolcott, 65 How. Pr. 51, 53.

[3] 47 N. Y. 389.

[4] Woodgate *v.* Fleet, 44 N. Y. 1.

will stand while the direction concerning distribution falls.[1] "When a will contains separate trusts, some of which are legal and some illegal, or various limitations of estates not dependent upon each other or essentially connected, some of which are legal and some illegal, the illegal portions may be stricken out and the other portions permitted to stand; and the books are full of illustrations of such cases. The courts will strive to uphold so much of a will as they can without frustrating the main intention of the testator or violating any rule of law."[2]

160. By what cloud or fire have the courts been guided in trying to find a just path through the many intricate trusts that have been before them? The purpose of the trust has always been a safe star. An unlawful purpose has been cut off and rejected, and the lawful purpose has been sustained, whenever such a separation would not operate unjustly to any persons for whom the testator desired to provide. Nor will the enveloping of several purposes in the same trust prevent a separation.[3] So long as the primary purpose is preserved, or the one which it may be presumed the testator most desired to have executed, a separation may be made. For by doing this the intention of the testator will be effectuated rather than defeated.[4] And in determining an inquiry of this kind "we are entitled to look," says Justice Comstock, "not only at the will, but at the external circumstances, in order to see its practical results."

161. Generally these separations have consisted in the

[1] Converse *v.* Kellogg, 7 Barb. 594; Irving *v.* De Kay, 9 Paige, 521; M'Donald *v.* Walgrove, 1 Sand. Ch. 274; Darling *v.* Rogers, 22 Wend. 483; Coster *v.* Lorillard, 14 Id. 265; Hawley *v.* James, 16 Id. 61; Kane *v.* Gott, 24 Id. 641; Doubleday *v.* Newton, 27 Barb. 431.

[2] Earl, J., Haynes *v.* Sherman, 117 N. Y. 437.

[3] Harrison *v.* Harrison, 36 N. Y. 543; Savage *v.* Burnham, 17 N. Y. 561, 577; Kane *v.* Gott, 7 Paige, 521, 525, S. C. 24 Wend. 641.

[4] Savage *v.* Burnham, 17 N. Y. 572.

dropping of classes who, if permitted to enjoy the income of an estate, would suspend the power of alienation beyond the statutory period. Thus the wife and children of a testator were to have the income of his property during their lives and if one of his children died leaving issue, they, in turn, were to have their parent's income until they attained their majority, when they were to become absolute possessors of that share of the estate. But the testator further provided that if any of his children died without leaving issue, or if they died before attaining their majority, then the share of such child should become a part of the residuary estate. This final limitation or provision was dropped while the primary disposition to the children remained. Disregarding the eliminated portion of the trust, it would terminate on the death of two specified lives with respect to each share of the eatate, the life of the widow and of each child, and was therefore valid.[1]

162. The case of Post *v.* Hover[2] is an instructive one. The testator devised a portion of his farm in equal shares to his children, but they were not to come into possession of them until they attained their majority. If either died before that period and left no issue the survivors were to take his share, and if all died under age the testator's son was to take the land in fee. The supreme court held that though a trust must be implied from other provisions in the will[3] which was clearly invalid because it was to run through the lives of three minors, it could be rejected leaving a direct and immediate devise in fee to the children, which, of course, would be defeated if they died before attaining their majority. The court of appeals decided that a trust had not been created, and, therefore, the

[1] Harrison *v.* Harrison, 36 N. Y. 543.

[2] 33 N. Y. 593.

[3] See §§ 31, 32.

estate vested in the children. The result to the children was quite the same as by the former decision, but the final determination rested on very different grounds. By the decision of the supreme court the testator intended to establish an express trust, which was set aside, whereby the gift to the children was anticipated by the whole period of their minority. This was a greater departure, so the court of appeals declared, than had ever been taken in any case. Justice Hogeboom, who delivered the opinion of the supreme court, did not regard such action as a great departure. The other objection raised by Chief Justice Denio, that the position of the supreme court would "subvert the power of management during the nonage of the children," by entrusting it to a trustee and not a guardian as the testator had provided, was groundless, for the supreme court, by setting aside the trust, left the guardian with the same authority to act as the court of appeals did by declaring that no trust existed. The difference between the reasoning of the two courts, therefore, was finally narrowed to a single point, though the importance of that was perhaps greater than the supreme court believed. In other words, if the testator had created an express trust it could hardly have been set aside in applying the rule we are considering. Indeed, the court of appeals maintained that, if a trust-term had been created, it would have contravened the statute and the land would have descended to the testator's heirs-at-law.[1]

163. In Morgan *v.* Masterton[2] a trust was created which was to last for three years, and during that period the income of the estate was to accumulate for the purpose of applying it to the erection of a statue. If, however, the fund proved to be inadequate for that purpose, it was to be distributed among some charitable institutions. The

[1] Post *v.* Hover, 33 N. Y. 599.

[2] 4 Sand. 442, 449.

trust having been declared void, because its duration was for a fixed period, an attempt was made to give effect to the gifts as a vested and immediate one. But the court, speaking through Justice Duer, said, "that by converting a future into a present estate, and a contingent into a vested interest, we should make a will for the testator, instead of expounding that which he has himself made."

164. In De Peyster *v.* Clendining[1] a trust existed in land for the benefit of the testator's wife and children. During her life she was to have the use of a farm; and after her death the income, either from it or other property into which it might be converted, was to be shared equally by the children. This devise was valid; but the testator went further and declared that if any child should die without issue, his income should go to the survivors for life, and the remainder to their children after the widow's death. This limitation to the survivors and to their children was inoperative.

165. In Haxtun *v.* Corse[2] an implied trust for accumulating income was cut off and also an authority to lease land until it could be sold, because it would create an illegal suspense.

166. In De Kay *v.* Irving[3] the trustees were to pay money to the testator's widow for maintaining the family, which consisted of more than two persons, until a specified day, and if she died before that time, they were to apply the money for the same purpose. This was declared to be a valid trust for as long a period as she might live not exceeding the specified day, when it must cease. For the period, therefore, between her death and the specified day the trust could not endure. Justice Beardsley admitted that the testator intended that the trust should continue until the day fixed for dividing the estate, but

[1] 8 Paige, 295, 306. [2] 2 Barb. Ch. 506. [3] 5 Denio, 646, 653.

as this intention could not be wholly regarded, it ought not to destroy or affect the trust for the life of the testator's wife. "The trust to receive and apply the rents and profits after her decease was not, in any respect, necessarily connected with a similar trust during her life."

167. In Kennedy *v.* Hoy[1] the income of a share of an estate was to be applied to the support of the testator's son W., and family, during his life, and after his death the income was to be paid to his surviving children until they reached the age of twenty-one years, when the principal was to be divided among them share and share alike. If the son should die without issue, or all of his children should die after him before attaining their majority, then the will directed a division of the share among the other children of the testator. The trust for W.'s life was declared valid, and it was complete and could stand notwithstanding the invalidity of the trust that was to continue after his death.

168. The Benedict case[2] should not be passed without notice. The testator had two sons and two daughters. One son and one daughter were minors, and a trust was created for their benefit until they became of age. Then the sons were to have their portions, but the trust was to continue during the lifetime of the daughters. As a life during the minority and adult periods is a single life, the trust was for three lives, the two daughters and the minor son. It therefore clearly transgressed the statute. An attempt was made to save a portion of the trust during the lives of the two minors, one son and one daughter, by cutting off the limitation to the adult daughter. Justice Andrews, speaking for the court, said that they "should feel disposed to sustain the trusts in favor of the

[1] 105 N. Y. 134.

[2] Benedict *v.* Webb, 98 N. Y. 460, 466.

other children, except for the reason that to uphold those, while setting aside the trust in favor of [the adult daughter], would seriously interfere with the intention of the testator, that all the children and their issue should share equally in his estate, and would produce great injustice." For by doing this each of the other children would take one-fourth share of the estate; and also as heirs and distributees an equal share with the adult daughter in the share intended for her. This case is very important in showing how far the court of appeals is willing to go in dividing a trust so long as no person shall be treated unjustly whom the trust-maker desires to benefit, or so long as his primary intentions shall not be disregarded.

169. In Oxley *v.* Lane[1] the testator gave his farm to his wife, in trust, which was to be occupied by her until his two minor children became of age. This trust created a valid suspension while the children lived, but could not be longer continued.

170. In the trust case of James *v.* Beasley,[2] which has been described, Justice Barrett said that if the absolute ownership of the shares of the estate was suspended for more than two lives, namely, the lives of the widow, the youngest of the daughters, and the youngest of the sons, still the residue of the will would not be invalidated, and for the reason that the purposes were separable. "It is perfectly well settled that if the purposes of a trust are separable, and some of them must arise within two lives, and there are others which must or may become operative only after the expiration of the two lives, the former may be sustained, but the latter cannot."[3]

171. Three more cases will be given. In one of them the trust was for the purpose of applying the income of real estate to a wife during life and afterward to her chil-

[1] 35 N. Y. 340. [2] 14 Hun, 520, see § 97. [3] Id. 523.

dren until they reached the age of twenty-one, when it was to be divided. This was considered a valid trust during the widow's life, but not afterward.[1] The case of Williams *v.* Conrad[2] is quite similar. The last case to be mentioned is of a different character. Two brothers and two sisters were to receive the income of real estate, the trustees paying it to them in equal proportions during their joint lives and after their "several deaths." As the trust-maker's intention clearly was to keep the *corpus* of the estate undivided until the death of all his brothers and sisters, the suspension was excessive.[3]

172. A trust cannot be divided when the legal and illegal parts are so blended that a separation of them is impossible.[4] This was the chief difficulty in a trust[5] in which the income was given to the trust-maker's wife, then to his children as tenants in common, and then to their wives and husbands. Thus the trust might continue for three lives, the life of the wife and of a child, and of the wife or husband of such child. An attempt was made to uphold the trust by limiting its duration to the lives of the wife and children, in which case the grandchildren would have taken the fee, but the court declined to preserve the trust beyond the life of the widow because the subsequent disposition was so bound together that the illegal portion could not be separated from the others.

173. The cutting off of alternatives is another application of this principle. The courts have quite uniformly held that when a limitation is to take effect on two alternative events, one of which is too remote, and the other is within the prescribed limit, it will be permitted to take

[1] Grout *v.* Van Schoonhoven, 1 Sand. Ch. 336. [2] 30 Barb. 524.
[3] Colton *v.* Fox, 67 N. Y. 348. See Everitt *v.* Everitt, 29 Id. 39.
[4] Harris *v.* Clark, 7 N. Y. 242, 257.
[5] Amory *v.* Lord, 9 N. Y. 403.

effect on the happening of the nearest one. Thus, the income of a trust fund was to be paid to the trust-maker's son during his life, which was one alternative. The other alternative was that on the wife's death, if the son should leave a wife, or if not, then on his death, the property should be conveyed to his son if one was living, but if having none, then to other persons mentioned in the will. The son was unmarried at the death of the testator and died unmarried. It was held that the son might have married a person who was "not in being" when the testator died, that she might have survived her husband, and in that event the trust would be unlawfully limited. This alternative was, therefore, clearly void. But as the other limitation, the death of the son, leaving no widow, could not possibly suspend the power of alienation beyond a single life, and as this had happened, the limitation was valid.[1]

174. In Fowler *v.* Depau[2] the trust-maker in effect gave his real and personal estate to his seven children for life in equal portions. The trust then provided for two contingencies in the alternative, making different dispositions of his property. One of these was the death of a child leaving issue, and the other her death leaving no issue. "Upon the decease of a child leaving issue surviving, he gives to such issue the principal and the fee of the share in which the parent of such issue had a life estate. This was a remainder upon a life estate, a remainder in fee upon a life estate in one undivided seventh part. Next he provides for another contingency. This issue might die before attaining the age of twenty-one years. The testator accordingly declares that if the issue of any child should die before attaining the age of twenty-one years and without leaving issue surviving him, his or

[1] Schettler *v.* Smith, 41 N. Y. 328; Tiers *v.* Tiers, 98 Id. 568, 573. See Mason *v.* Jones, 2 Barb. 245–247.

[2] 26 Barb. 224, 232.

her share should go to his or her surviving brothers and sisters in equal portions, and the issue of such as may be then deceased *per stirpes*. This is 'a contingent remainder-in-fee created on a prior remainder-in-fee, to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years.' This statute, therefore, authorizes such a contingent remainder, and makes it an exception to the rule forbidding the suspension of the absolute power of alienation for a longer period than during the continuance of not more than two lives in being at the creation of the estate." The provisions of the trust in both alternatives were declared valid. The second alternative, however, would have been invalid had the trust-maker given the estate to his children as joint tenants. But they were tenants in common. In Dodge, Ex. *v.* Pond[1] the testator directed the investment of a fund to raise an annuity of five thousand dollars for his widow during her life. If she died before a division of his residuary estate, which was to be made on the death of two other persons, or at the end of ten years, the fund was to fall into the residuum. If she lived longer than this, then the fund was to go to the testator's children and grandchildren. The disposition in both alternatives, the expiration of their lives, or ten years, created an illegal suspense.

175. In Provost *v.* Provost[2] the trustees were to pay the income from real estate to his widow until all of his children were of age, and then the trust was to cease. After that she was to have a life estate in a portion of the land, and his son was to have the remainder therein. How long could the trust last? The alternative was during the widow's life, or until the children attained their

[1] 23 N. Y. 69, 79.

[2] 70 N. Y. 141; Manice *v.* Manice, 43 Id. 303, 370.

majority. In no event could the trust last longer than her life, and would end sooner if the children attained their majority before her death. Either event, whenever it happened, determined the trust.

176. So if a trust is to sell or mortgage, and the trust is valid for the first purpose; but invalid for the other, it will be upheld for the lawful purpose.[1]

177. In applying this rule no trust-term to a class can be divided, or words in the description of a trust to one person be eliminated for the purpose of legalizing it.[2] In other words, a single purpose cannot be divided or changed by rejecting any part of the description. For, "if it were allowable to sever lives thus grouped, dropping all that might be in excess of two and to cut off one or more of several *cestuis que trust*, all of whom are provided for in a single clause of the will and in pursuance of a single intent of the testator, all being embraced in a common purpose, all the trusts which have been adjudged void might have been sustained in part instead of being void *in toto*."[3] Thus in Haynes *v.* Sherman a trust was to last until the trust-maker's youngest child should become twenty-one, "or arrive at that age if living," thereby limiting the duration of the trust to a fixed period. An attempt was made to legalize the trust by eliminating the words quoted, thus limiting the duration of the trust by the life of a minor. But the court held that such an elimination could not be made, and as its duration was for a fixed period that it transgressed the statute. But why could not this trust have been regarded as alternative, and as one of these was legal, why could not the other have been rejected and the trust saved?

178. We should add, though, that whenever the rule has

[1] Darling *v.* Rogers, 22 Wend. 483. See Harrison *v.* Harrison, 36 N. Y. 543.
[2] Haynes *v.* Sherman, 117 N. Y. 433, 437.
[3] Allen, J., Knox *v.* Jones, 47 N. Y. 398.

been applied the valid parts of the trust have been regarded as complete in themselves.[1] If a trust is an entirety it cannot be divided. In Tiers *v.* Tiers[2] Justice Rapallo remarked: "The rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but will be cut off in the case of a trust which is not an entirety, as well as in the case of a limitation of a legal estate." The question, then, in applying this rule to a trust, is, do the parts belong to a structure which will be subverted if some of them are saved and others are discarded? The answer must be drawn from examining the trust instrument. In Tiers *v.* Tiers[3] the testator directed that four equal parts of his estate should be invested and the net income be paid in equal shares to the four children of the testator during their lives. On the death of each child the trustees were to transfer his share to his children when they reached the age of twenty-one. This was a valid bequest, but the testator provided that if such children should die before the age of twenty-one, and without having lawful issue, then the share or portion of the one so dying should form a part of his residuary estate for the benefit of his children. This limitation was cut off, Justice Rapallo saying that it was quite separable from the primary trust and merely incidental, and that the purpose of it was to provide for a contingency which might never arise.

179. Finally, if the principal purpose of a trust fails, no effect can be given to the remainder.[4]

[1] Kennedy *v.* Hoy, 105 N. Y. 134; Van Schuyver *v.* Mulford, 59 Id. 426.

[2] 98 N. Y. 568, 573; Harrison *v.* Harrison, 36 Id. 543; Henderson *v.* Henderson, 113 Id. 15; Knox *v.* Jones, 47 Id. 389, 397, 398. See Tilden *v.* Greene, 54 Hun, 239.

[3] 98 N. Y. 568.

[4] Holmes *v.* Mead, 52 N. Y. 332, 345; Savage *v.* Burnham, 17 Id. 572.

SECTION VII.

CLOSING OF THE TRUST, FOREIGN TRUSTS AND FOREIGN TRUST PROPERTY.

180. When the valid purposes for which an express trust is created have been accomplished the estate of the trustee ceases.[1] Until then, as we have seen, the estate is vested in him and the beneficiary has no interest therein.[2] After that the estate vests in the devisees who have a beneficial interest therein, or in the heirs-at-law of the author of the trust,[3] and the power of alienation is revived.

181. A testator devised his real estate to trustees who were to hold one-third part for the benefit of each of his daughters. He also provided for three emergencies should either die: First, if married and leaving issue and a husband; secondly, if unmarried and without issue; and, thirdly, if unmarried without appointing for what purpose her property should go. In each event, the court declared, the trust was purely passive and the remainder

[1] R. S. Part II, Ch. 1, Tit. 2, § 67; Betts *v.* Betts, 4 Abb. N. C. 385.
[2] §§ 18, 20, 21; McCosker *v.* Brady, 1 Barb. Ch. 329.
[3] R. S. Part II, Ch. 1, Tit. 2, § 62; Parks *v.* Parks, 9 Paige, 124.

vested in the beneficiaries.[1] One of the daughters died giving her estate to her two sisters and to the survivor of them. The contention was that the power of suspension was too long, as the computation must run from the creating of the power in the will of her father, and that there had been a devise for her life, then one to the two sisters, then to the survivor. But the court declared that the suspension had not exceeded the daughter's life. "Her sisters took legal estates in her one-third, since the trust in her father's executors, after her death, was passive, and did not prevent the vesting of the entire title."[2] In like manner when the trustees, for the purpose of paying the widow of the trust-maker the income of the trust property during her life, are required to retain possession of it after the trust-term has ended and the title thereto has vested in the remainderman, the power of alienation is no longer suspended.[3]

182. Although a trust cannot be ended until the time prescribed, the trustees with the consent of the beneficiaries, or by an order of the court if they are not of age, can designate and appropriate a portion of an estate as the trust fund, thereby releasing the residue from the trust liability.[4]

183. In applying the law regulating the suspension of the power to alienate land, no exception can be made in favor of a foreign trust-maker who owns land here. His trust must conform to the law of New York where his trust-property is located.[5] On the other hand, a New York trust-maker's disposition of his outside real estate

[1] Mott v. Ackerman, 92 N. Y. 539, 547, 548, affirming Onderdonk v. Ackerman, 62 How. Pr. 318.

[2] Id. 550.

[3] Gilman v. Reddington, 24 N. Y. 9

[4] Leitch v. Wells, 48 N. Y. 585.

[5] Hobson v. Hale, 95 N. Y. 588; White v. Howard, 46 Id. 144; Hosford v. Nichols, 1 Paige, 220.

would be valid if conforming to the law of its location, though the disposition would be invalid if it were located here.[1] Nor does the law prevent a trust-maker from directing his trustee to buy land in another state and to hold it in trust for purposes and persons which would be valid there, regardless of the law in New York. Says Justice Allen: "There certainly is no good reason, growing out of the policy or the laws of this state, why a testator, domiciled here, might not make provision, by a bequest of money to trustees, to be invested in an estate for his son in-tail, in a state where entails are allowed."[2] A different rule formerly prevailed.[3]

184. Again, if real and personal estate are given in the same trust, they are to be regarded as distinct, and the law of the state where the real estate is located will apply to that portion of the trust property, and the law of the state where the testator was domiciled will apply to the personal portion.[4]

185. If a foreign trust-maker should direct his trustee to sell or convert his land, located here, into personal property, and to hold it for the same trust purpose, the law regulating the suspension of alienation would apply with similar force to the personal property. If the trust would not have been valid with respect to real estate, its conversion into personal property cannot save the trust from destruction.[5]

186. With a statutory guide so simple, why should any one have ever failed to make a valid trust? Many of these elaborate and tangled creations are in sharp con-

[1] Knox *v.* Jones, 47 N. Y. 389; Abell *v.* Douglass, 4 Denio, 305.

[2] Chamberlain *v.* Chamberlain, 43 N. Y. 424, 435; Kennedy *v.* Town of Palmer, 1 T. & C. 581.

[3] Wood *v.* Wood, 5 Paige, 596.

[4] Knox *v.* Jones, 47 N. Y. 389.

[5] Brewer *v.* Brewer, 11 Hun, 147; Hobson *v.* Hale, 95 Id. 588.

trast with this transparent law. Did their authors, when making them, forget or misunderstand the law, or did they imagine that their wishes, whether in harmony with the law or not, would be respected? Could they stand beside their wrecks, on the shore of litigation, what would they condemn most, the law, its ministers, their counsellors, the irreverent wreckers, or themselves?

CHAPTER III.

ACCUMULATIONS.

SECTION I.

FROM THE INCOME OF REAL ESTATE.

187. The second purpose for which an express trust can be created is "to receive the rents and profits of lands,

and to accumulate the same for the purposes and within the limits prescribed" by statute.[1] What are these limits? "An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows: If such accumulation be directed to commence on the creation of the estate, out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority.

"If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this article permitted for the vesting of future estates and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority."[2]

"If, in either of the cases mentioned in the last section, the direction for such accumulation shall be for a longer term than during the minority of the persons intended to be benefited thereby, it shall be void as respects the time beyond such minority. And all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void."[3]

188. These are not in conflict with the statutes regulating the suspension of alienation previously mentioned, which permit a suspension during two lives and a minority. The thirty-seventh section permits an accumulation of rents during the period permitted by the sixteenth section. Read in connection, they cover the case of a disposition of the ultimate fee after the expiration of two lives in favor of a minor, an accumulation during his mi-

[1] R. S. Part II, Ch. 1, Tit. II, § 54, sub-division 4.
[2] Id. § 37. [3] Id. § 38

nority, and a contingent remainder over if he should die during minority.[1]

189. From this general view we shall inquire more particularly into a statutory accumulation. Perhaps the best idea may be obtained by a series of illustrations. Thus, a direction to ascertain the amount of legacies bequeathed to several persons by adding to the principal of the fund the amount of interest which must be paid to some of them, would not be a direction to accumulate. There would be no addition to the fund, for the interest would be already paid to those who ought to receive it; the addition, therefore, would be simply a method of computation.[2] But if a legacy should be paid after a prescribed period, consisting in part of money accumulated during the interval, it would not be such an accumulation as the law authorizes.[3] In Dayton *v.* Conklin[4] an accumulation of the income of bank stock was directed for twenty-five years, and then it was to be distributed among the survivors of the testator's ten children and the issue of those who had died leaving children. This direction was clearly contrary to the statute. Again, if the real estate from which an income is to flow is lawfully turned into personal property, and a portion is immediately taken to satisfy the person who was to receive the income, all subsequent growth or increase of the remainder is only a restoration of the original principal, and not an accumulation.[5] Thus, a testator gave a life estate in two-twentieths of his real estate to his widow, and the remainder to his infant daughter if she survived her mother, if she did not then to other beneficiaries. The

[1] Rapallo, J., in Manice *v.* Manice, 43 N. Y. 375.
[2] Titus *v.* Weeks, 37 Barb. 136.
[3] Bean *v.* Bowen, 47 How. Pr. 306.
[4] 2 Saratoga Ch. Sentinel, 54.
[5] Livingston *v.* Tucker, 107 N. Y. 549.

real estate was sold and the widow accepted by legal right a gross sum in lieu of her life interest. The balance by order of court was invested and was to be paid "with all accumulations of interest, dividends or income" to the daughter if living, and if she were not then to the other beneficiaries. After the daughter became of age she claimed the money on the ground that such an accumulation was not legal. But the court said there had been no accumulation. The income, since paying the widow a gross sum in lieu of her life interest, had been merely the paying back to the principal those advances, and restoring it to the condition it would have been in if it had not been depleted. At the death of the widow it would simply be, in theory at least, fully restored, and the original devise over capable of being accomplished as intended. Lastly, if a trust was created to pay a sum in gross by collecting and accumulating rents to a specific amount, the accumulation would not be of the nature described in these statutes and would not suspend the alienation of the estate.'

190. Of course, whenever all the income of an estate is paid to the rightful recipients there can be no accumulation and no suspension. In Horton *v.* Cantwell[2] the trust-maker directed his trustee "during the lifetime of [his] daughter, * * and during her minority to apply [the] rents, profits, interest and income" of his real estate and personal estate, or so much as might be necessary, to her support, maintenance and education, and after her minority to pay over to her from time to time the said rents, profits, interest and income. It was contended that the trust was void because the balance of the rents and profits, during the daughter's minority, not required for her support, might be added to the *corpus* of the estate

[1] Radley *v.* Kuhn, 97 N. Y. 26, 32.

[2] 108 N. Y. 255.

and interest be obtained therefrom for the beneficiary. But the court declared that there was no direction for an accumulation, and the whole balance, if any remained, must be paid to her when she became twenty-one.

191. The accumulation must be only for minors.[1] An accumulation, therefore, which is to begin from the death of a testator and continue during the life of his daughter for the benefit of unborn issue is invalid, and belongs "to the persons presumptively entitled to the next eventual estate;"[2] and so is a trust to accumulate rents and profits for the benefit of a testator's wife,[3] or an adult,[4] or a lunatic who is not a minor,[5] or for a fixed period,[6] or for an indefinite period,[7] or until reaching a fixed sum,[8] or until the end of two lives in being at the testator's death,[9] or until the death of the last survivor of twelve annuitants.[10] In Hobson *v.* Hale the testator directed that the residue of his estate should remain under the control of his trustees until the death of the last survivor of twelve annuitants and that then the residue, with all the accumulated interest, should be divided equally among his grandchildren. The law would be no less fatal to an accumulation for a person until he became forty years of age,[11] or until the death of the testator's sister-in-law,[12] or until the death of a testator's widow.[13] So would be a direction to accumulate interest for the benefit of the grandchildren of a tes-

[1] Boynton *v.* Hoyt, 1 Denio, 53; Converse *v.* Kellogg, 7 Barb. 597; Hetzel *v.* Barber, 69 N. Y. 1; Gilman *v.* Reddington, 24 Id. 9; Bean *v.* Hockman, 31 Barb. 78; Moore *v.* Hegeman, 72 N. Y. 376; Hull *v.* Hull, 24 Id. 647; Cook *v.* Lowry, 95 Id. 103; Harris *v.* Clark, 7 Id. 242; Craig *v.* Craig, 3 Barb. Ch. 76; Bryan *v.* Knickerbacker, 1 Id. 409, 425; Bean *v.* Bowen, 47 How. Pr. 306.

[2] Cook *v.* Lowry, 95 N. Y. 103.

[3] Boynton *v.* Hoyt, 1 Denio, 53.

[4] McCormack *v.* McCormack, 60 How. Pr. 196.

[5] Craig *v.* Craig, 3 Barb. Ch. 76.

[6] Rice *v.* Barrett, 102 N. Y. 161.

[7] Yates *v.* Yates, 9 Barb. 324.

[8] Williams *v.* Williams, 8 Id. 525.

[9] Harris *v.* Clark, 7 N. Y. 242.

[10] Hobson *v.* Hale, 95 N. Y. 588.

[11] Simpson *v.* English, 1 Hun, 559.

[12] In Matter of Ermand, 24 Hun, 1.

[13] Robison *v.* Robison, 5 Lans. 165.

tator if the husbands of the children were able to support their wives. Thus in Kilpatrick *v.* Johnson[1] the testator intended that an accumulation should be made for the benefit of his grandchildren unless the money was needed to support his daughters. If an accumulation is for several children and to continue until the youngest attains majority, it is invalid, for, if sustained, it would continue for varying periods of the adult life of all the children except one.[2] If a trust was to accumulate and pay over when each child attained majority it would be valid.[3] But "a mere contingent limitation of the estate in favor of the minor on his coming of age would not be sufficient to sustain a trust or direction for accumulation during his minority."[4]

192. Accumulations, therefore, for all classes, institutions or persons, save minors, are swept away by this statute. Consequently, if a testator, should authorize the sale of his estate, and direct that the proceeds should be invested and accumulate for five years, and that, at the end of the period, they should be converted into cash and distributed, the direction for accumulation would be void.[5] Even an accumulation from the income of a trust-fund for the support of a minister which is not spent during a

[1] 15 N. Y. 322.

[2] Forsyth *v.* Rathbone, 34 Barb. 388. In this case Sutherland, J., said: "The testator directs the surplus interest or income to be accumulated for the benefit of all the grandchildren until the youngest attains his or her majority. Such accumulation, if fully carried out, would not be for the benefit of minors, exclusively. The direction is therefore void so far as it directs an accumulation for the benefit of any of the grandchildren after they have attained their majority." Ruppert's Estate, Tucker, 480; Thompson *v.* Clendening, 1 Sand. Ch. 367.

[3] Ruppert's Estate, Tucker, 480.

[4] Rapallo, J., in Manice *v.* Manice, 43 N. Y. 377. See Woodgate *v.* Fleet, 64 Id. 566, 572–576.

[5] Bean *v.* Bowen, 47 How. Pr. 306.

vacancy would be invalid though it is to be paid to his successor. In the strong language of Justice Wright: "It is absolutely void and the effect is necessarily to avoid the entire limitation. It is no answer to say that the contingency of a vacancy in the rectorship may not occur. * * The statute avoids all directions for the accumulation of the interest, income or profits of personal property except for the benefit of minors, and to terminate at the expiration of their minority."[1]

193. The minor must be living when the accumulation begins, but the law does not require that he should be alive at the testator's death unless the accumulation is to begin at that time. The law is fulfilled if he is alive at the beginning of the accumulation, whether this be at the testator's death or afterward.[2]

194. As an accumulation can only be for a minor, it must cease when he dies. An accumulation is limited to living persons.[3] Before the enactment of the revised statutes a trust for the accumulation of the rents of real estate, or of the income of personal property might continue for the same length of time as the suspension of the power of alienation; and the accumulated fund might be

[1] King *v.* Rundle, 15 Barb. 139, 145. See Andrew *v.* N. Y. Bible and Prayer Book Society, 4 Sand. 176.

[2] "An accumulation for the benefit of an unborn child, to commence after the birth of the child, and to terminate with his minority is lawful, provided that it is also to commence within the time permitted for the vesting of future estates, that is to say, on the expiration of the two lives in being; but an accumulation for the benefit of an unborn child, to commence before his birth, is not permitted under any circumstances, and this was the objection to the validity of the accumulations in the cases of Haxtun *v.* Corse, 2 Barb. Ch. 518, and Kilpatrick *v.* Johnson, 15 N. Y. 322." Rapallo, J., Manice *v.* Manice, 43 N. Y. 376. See also Collin *v.* Collin, 1 Barb. Ch. 638. A trust to accumulate the income of property for the benefit of an infant who is not *in esse* at the creation of the trust must, in order to be valid, be so limited that the accumulation will begin and terminate within two lives in being at the creation of the trust. Gott *v.* Cook, 7 Paige, 521.

[3] Goebel *v.* Wolf, 113 N. Y. 415.

limited to any person or class of persons who were *in esse* at the termination of the trust. But by the revised statutes "a valid trust for the accumulation of the rents and profits of real estate, or the interest or income of personal property can only be created for the benefit of a minor or minors who is or are in existence when the accumulation is to commence and the accumulation must cease with the termination of such minority."[1]

195. When a valid accumulation is made for the benefit of a minor, it not only vests in him, but absolutely on the attainment of his majority, so that a divesting after that period is impossible.[2] Nor can payment of an accumulation be postponed beyond that event,[3] though the courts for many years maintained a different opinion.[4]

196. If a minor is not divested during his minority of his interest, and, on the other hand, is not absolutely vested of the same when attaining majority, the trust is invalid.[5] But a trust may provide for divesting a minor of his interest should he die before attaining majority, and for giving the accumulation to others.[6] And "a limitation to another person of the *corpus* of the estate, on

[1] Chancellor Walworth, Bryan *v.* Knickerbacker, 1 Barb. Ch. 426.

[2] Gilman *v.* Healy, 1 Dem. 407, citing Bolton *v.* Jacks, 6 Rob. 166; Hetzel *v.* Barber, 69 N. Y. 1.

[3] Pray *v.* Hegeman, 92 N. Y. 508; § 197.

[4] Gilman *v.* Healy, 1 Dem. 409; Robison *v.* Robison, 5 Lans. 165, 169; Meserole *v.* Meserole, 1 Hun, 66, 72.

[5] Gilman *v.* Healy, 1 Dem. 408.

[6] Gilman *v.* Healy, 1 Dem. 408; Bolton *v.* Jacks, 6 Rob. 166; Manice *v.* Manice, 43 N. Y. 303; Willets *v.* Titus, 14 Hun, 554. Justice Jones has remarked on the disposition of the fund when the testator has not anticipated the event of the minor's death. It must "if there are no directions in the will, and no clause in the will which would carry it in a different direction, revert back, and in such event, the testator would die intestate as to such fund. But there is no reason why a testator should not have the power to anticipate such an event, and treat this accumulated fund as part of his original estate, and devise it to such persons as he chooses." Bolton *v.* Jacks, 6 Rob. 230.

the death of the minor during his minority, carries with it the accumulated rents and income.[1] But such a limitation, to take effect after the accumulations have become vested absolutely, only gives to the substituted beneficiary the corpus of the estate."[2]

197. A direction to accumulate the income of real estate during a minority, accompanied with a disposition of the accumulated fund, whereby the income that may arise after the expiration of the minority is given to the minor for life and the principal on his death to his issue, or to other persons, is void. Says Justice Andrews: "The proper construction of the provision in section thirty-seven, that the accumulation must be for the benefit of minors requires, we think, that when the period of accumulation ceases, the accumulated fund shall then be released from further restraint and paid over to the person for whose benefit the accumulation was authorized."[3]

198. In Moore *v.* Hegeman[4] the will provided for an accumulation during the minority of three children and directed that money should be "applied" to their education and support, and after that period had ended the entire income was to "be paid over" to them. It was contended that the provision to pay was valid only when used as an equivalent to apply, and when used in any other sense was void, and as these words were used in opposition to each other the trust could not be upheld. But they were regarded as equivalent. One phrase referred to the minority of the children and the other applied when they arrived at full age, but there was no legal distinction between the two.[5]

[1] Willets *v.* Titus, 14 Hun, 554.

[2] Surrogate Livingston, Gilman *v.* Healy, 1 Dem. 408, citing Matter of Davison, 6 Paige, 136.

[3] Pray *v.* Hegeman, 92 N. Y. 508, 516, revsg. 27 Hun, 603, overruling Meserole *v.* Meserole, 1 Id. 66: Barbour *v.* De Forest, 95 N. Y. 13, revsg. 20 Hun, 615. [4] 72 N. Y. 376. [5] Leggett *v.* Perkins, 2 Id. 297.

199. In Savage *v.* Burnham[1] the trustees were to apply the income to maintaining and educating six sons and four daughters, named in the will, in equal shares, until the sons should become twenty-one and the daughters the same age or be married, respectively ; the trustees moreover were to pay or transfer the principal in equal shares to the sons and daughters, and the shares of the sons were to become vested at twenty-one and then to be paid or transferred, and the shares of the daughters were to be vested in the trustees, and the income was to be paid to them after twenty-one or marriage, during life, and on the death of each daughter leaving issue, her share was to vest in such issue. The accumulation was declared valid for it must cease on each share when the sons and daughters reached twenty-one. In the case of the sons the principal then vested, and in the case of the daughters the direction was explicit to pay them the whole income after that period.

200. In Harris *v.* Clark[2] the testator left a legacy from which the trustees were to pay an annuity to his sister for life, and the remainder to her daughter while she lived. The residue of the income from the legacy was to accumulate until the daughter's death, and then it was to be paid to her children, and if having none to a nephew when he became twenty-one, or to his issue if dying sooner, or if having none then to other beneficiaries. This trust was void for the double reason that it suspended the ownership of the property longer than two lives, and provided for an accumulation beyond the life of a minor.

201. In Kane *v.* Gott[3] the testator directed his executor to pay to each of his two nieces, after they became twenty or were married, one equal half of the income of his estate during their respective lives, and in the event of

[1] 17 N. Y. 561. [2] 7 N. Y. 242. [3] 7 Paige, 521.

the death of either after she became twenty without leaving lawful issue the other was to receive the whole income during her life; if both nieces should die without issue during the lifetime of his mother she was to receive the remainder. In construing this will it was determined that the executors were to accumulate the moiety of the income belonging to each niece for her exclusive benefit until she became twenty or was married, and then to pay it over to her, or her legal representatives if she died, and that, after they had respectively arrived at that age or were married, the executors were to pay over to them their second share of the income as it should accrue and be received by the executors. It was further determined that the trust to sell the property, and to remit the proceeds and to accumulate the income and pay over the same to the nieces for their respective use was a valid trust.

202. In McGrath *v.* Van Stavoren[1] the testator provided that if either, or both of his sisters should marry and leave issue, that one-half of the land should go to such issue, but if neither should marry, or marrying should leave no issue, the survivor should collect the rents accruing to the estate, and invest the portion of the sister who died and divide the same after the death of the surviving sister among the testator's nephews and nieces or their issue. This direction concerning accumulation was void, but did did not invalidate the other parts of the devise.

203. When a trust for accumulation is created for the benefit of the children of a person who is living at the death of the creator of the trust, posthumous children will take as beneficiaries. They are regarded by statute the same as other children of the same parent. "Where a future estate shall be limited to heirs, or issue, or chil-

[1] 8 Daly, 454.

dren, posthumous children shall be entitled to take in the same manner as if living at the death of their parent."[1] This statute, so Justice McCoun has remarked,[2] "is a complete annihilation in law of the time that may elapse between the death of a father and the birth of a previously-begotten child. The instant such child is born it is made to step back to the end of the father's life, there to take its stand and become clothed with all the rights of property previously conferred."

204. If a legacy be given for a legal purpose, for example, to a religious corporation, but the direction for accumulation is illegal, the legacy will be sustained.[3] Thus in Williams *v.* Williams[4] a legacy was given to a corporation for a legal purpose with the direction that it should accumulate until reaching a fixed sum before the income could be expended. The wrong direction did not impair the validity of the legacy.[5]

205. And, in general, an invalid direction concerning an accumulation does not impair the gift of the principal, or other directions or orders that are valid.[6]

206. When the direction to accumulate is invalid what must be done with the accumulation? In the case of an accumulation during the life of a widow of the testator

[1] R. S. Part II, Ch. 1, Tit. 2, § 30.

[2] Mason *v.* Jones, 2 Barb. 252. A testator devised one-third of his realty to his widow for life and the remainder to his grandchildren who should survive her. If after his death children should be born to his daughter H. they were to share in the estate devised to the widow. This provision for after-born children did not violate the statute; "the absolute ownership is not suspended for more than two lives in being at the creation of the estate. All the grandchildren take upon the death of the widow." Hotaling *v.* Marsh, 4 N. Y. Supp. 356, 358.

[3] Kilpatrick *v.* Johnson, 15 N. Y. 322; Williams *v.* Williams, 8 N. Y. 525.

[4] 8 N. Y. 525.

[5] Wilson *v.* Lynt, 30 Barb. 124.

[6] Bolton *v.* Jacks, 6 Rob. 166; Forsyth *v.* Rathbone, 34 Barb. 388; Kilpatrick *v.* Johnson, 15 N. Y. 322; Haxtun *v.* Corse, 2 Barb. Ch. 506; Lang *v.* Ropke, 5 Sand. 363; Williams *v.* Williams, 8 N. Y. 538; Robison *v.* Robison, 5 Lans, 165, 168; McCormack *v.* McCormack, 60 How. Pr. 196.

for nephews who were not minors, it was determined that it must remain in the possession of the executor as principal until her death and then be paid to the residuary legatee.[1] In another case in which the accumulation was for an adult lunatic, the court declared that if an annuity had been absolutely given to him, the surplus, which was not needed for his support, might be paid to his committee and be invested for his use.[2]

207. The fortieth section[3] of the statute provides that, "when in consequence of a valid limitation of an expectant estate there shall be a suspense of the power of alienation or of the ownership during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." The purpose of this statute can be best given by describing its application. A testator created a trust whereby the income of his estate was to be shared equally by his wife and six children while his wife lived, and after her death the estate was to be divided equally among the children then living, and if any were dead leaving issue, the latter were to receive their parent's share. One of the children, H., died during the widow's lifetime leaving a husband and son. She made a will giving all her property to her husband for life and the remainder to her son. Both husband and son claimed the income of the trust estate formerly paid to H. The trustees claimed that it belonged to the wife and five surviving children, and that the *corpus* of the estate vested in them during the widow's life, and did not vest in the children until her death. But the court held that when H. died the one-seventh of the income, which was payable to her

[1] Robison *v.* Robison, 5 Lans. 165.
[2] Craig *v.* Craig, 3 Barb. 76.
[3] R. S. Part II, Ch. 1, Tit. 2.

during her life, did not pass to the surviving six, and was not bequeathed by the will, and therefore passed to the son. This was a valid limitation of an expectant estate. During the widow's lifetime there was a suspension of the power of alienation by the trust, and after H.'s death her portion of the income was not disposed of by the will, and as the son was the person presumptively entitled to the next eventual estate, it belonged to him.[1]

208. In Schettler *v.* Smith[2] a testator directed his executors to pay a fixed sum annually from the income of his property to his daughter until her marriage, and after that, if she did not marry A., or if she did, after his death, the entire income during her life. During her marriage though, if to A., she was to receive nothing. After several years she married A. It was decided that as there was no provision for the accumulation of the surplus of the income in excess of the annual sum paid to her previous to her marriage with A., or on his death, it belonged to her as the person presumptively entitled to the next eventual estate in the income.[3]

209. Formerly, the application of this statute to the income of personal estate was questioned. It is true that the language refers only to the rents and profits of land.

[1] Delafield *v.* Shipman, 103 N. Y. 463; Delafield *v.* Barlow, 107 Id. 535.

[2] 41 N. Y. 328.

[3] This section does not prevent a valid limitation of a remainder to the beneficiaries of the trust to take effect in possession on its termination and which shall be vested in interest at the death of the testator. The inheritance in Stevenson *v.* Lesley, 70 N. Y. 512, was divided into two estates, an estate in the trustees during the minority of the grandchildren respectively and a remainder to them in fee. The declaration in the sixtieth section, that a valid express trust shall vest the whole estate in the trustee and that the beneficiaries shall take no estate or interest in the lands, clearly refers, said Justice Andrews, to the trust estate, and not to an interest in the land not embraced in the trust. In that case, therefore, the residuary devise was valid, for the power of alienation was not suspended beyond the minority of a beneficiary. If any grandchild died during minority, his share was liberated from the trust and passed absolutely.

Consequently Justice Selden maintained that if applicable at all to the income of personal estate it was only in a case in which the income was derived from a specific fund, or from property so situated that its income could be readily distinguished from that of all other property. "Neither in terms nor in reason," said Justice Selden, "is it applicable to any other case. The statute is founded upon the presumption that the donor of property may naturally be supposed to intend that the income should go to the same person to whom he had given that out of which the income arises. Nothing, therefore, can properly be held to pass under it but income which proceeds from the specific property in which the future interest exists." [1] Since then the courts have had no hesitation in applying the statute to accumulations of personal property as well as those flowing from real.[2]

210. Though accumulations can be made for a single purpose, a testater may provide, during the period in which the alienation of his property may be lawfully suspended, for the payment of legacies from the annual income of his estate. If the effect of such a direction should be to accumulate a surplus, the direction to this extent would be void ; the legacies would not be invalid ; and the surplus of income after paying them must be annually distributed among those who are entitled to it.[3]

211. When trustees act under a power, the land passes at once to the devisees subject to its execution ;[4] and the

[1] Dodge, Executor, *v.* Pond, 23 N. Y. 69, 83.

[2] Cook *v.* Lowry, 95 N. Y. 103; Hallett *v.* Thompson, 5 Paige, 583; Williams *v.* Thorn, 70 N. Y. 270; Tolles *v.* Wood, 99 Id. 616; Haxtun *v.* Corse, 2 Barb. Ch. 506; Kilpatrick *v.* Johnson, 15 N. Y. 322; Gilman *v.* Reddington, 24 Id. 9; Manice *v.* Manice, 43 Id. 303; Pray *v.* Hegeman, 92 Id. 508; Barbour *v.* De Forest, 95 Id. 13; McGrath *v.* Stavoren, 8 Daly, 454 ; Robison *v.* Robison, 5 Lans. 168. Contrary decisions, Hull *v.* Hull, 24 N. Y. 647; Vail *v.* Vail, 4 Paige, 317.

[3] Dodge, Executor, *v.* Pond, 23 N. Y. 69.

[4] Scott *v.* Monell, 1 Red. 431, 441 ; Germond *v.* Jones, 2 Hill, 569, 573 ; Hall *v.* McLaughlin, 2 Brad. 107.

income and profits that may arise therefrom before it can be divided or sold belong to the heirs. But this rule does not apply to personal property. The title to this is vested in the executors, and the income and profits before distribution belong to them, unless the testator has disposed of them. This would be an accumulation, therefore, and is void by the statute. In Scott *v.* Monell[1] the surrogate remarked that though the will did not in terms direct an accumulation, the direction given led to that result and consequently the appointment of a further and distant time for the division of the personal estate to which such an accumulation was a necessary incident, was void.[2]

SECTION II.

ACCUMULATION OF THE INCOME OF PERSONAL PROPERTY.

212. "An accumulation of the interest of money, the produce of stock or other income or profits arising from personal property, may be directed by an instrument sufficient in law to pass such personal property as follows: 1. If the accumulation be directed to commence from the date of the instrument, or from the death of the person executing the same, such accumulation must be directed to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority. 2. "If the accumulation be directed to commence at any period subsequent to the date of the instrument, or subsequent to the death of

[1] 1 Red. 442.

[2] The court citing Converse *v.* Kellog, 7 Barb. 590; Hawley *v.* James, 5 Paige, 318; Vail *v.* Vail, 4 Id. 317.

the person executing such instrument, it must be directed to commence within the time allowed in the first section of this title, for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority."[1]

"All directions for the accumulation of the interest, income or profit of personal property, other than such as are herein allowed, shall be void; but a direction for an accumulation, in either of the cases specified in the last section, for a longer term than the minority of the persons intended to be benefited thereby, shall be void only as respects the time beyond such minority."[2]

213. By these statutes "accumulations of the income of personal property are placed on the same footing, and are governed by the same statutory rules" as an express trust for receiving and applying the income of real estate. "1. An accumulation, in order to be valid, must be for the benefit of minors, and it must terminate at the expiration of their minority. 2. If the accumulation is directed to commence on the creation of the estate, or on the taking effect of the instrument by which it is directed, it must be for the benefit of one or more minors then in being. 3. If the accumulation is directed to commence at a future period, that is to say, at a time subsequent to the creation of the estate, or the taking effect of the instrument by which it is directed, the commencement must be within the time allowed for the vesting of future estates in lands,

[1] R. S., Part II, Ch. IV, Tit. 4, § 3.

[2] Id. § 4. "It is * * hostile to the spirit of the statute regulating accumulations of personal property to permit an accumulation of the interest upon the principal sum bequeathed for an indefinite period, which may extend through very many years." Allen, J., Holmes *v.* Mead, 52 N. Y. 344.

or, which is the same thing, for the vesting of the absolute ownership of personal property, that is, within the running of two lives in being. 4. Where it is to commence at such future period it must commence at some time during the minority of the persons intended to be benefited."[1]

214. "The time allowed for an accumulation to commence in future is the same as is allowed for a future estate in lands to vest in possession, and when the beneficiary, under a trust for such an accumulation, happens to be *en ventre sa mere*, at the death of the father, the same reason exists why the time that may elapse for his birth should be disregarded."[2] The possibility of the birth of such a beneficiary under a trust of accumulation for the benefit of the issue or children of the sons in being of the testator is not an objection to the validity of the trust.[3]

SECTION III.

THE USE OF ACCUMULATIONS.

215. How an accumulation can be used.

216. When creditors can take accumulations.

215. By statute, the use of accumulations for the benefit of needful beneficiaries has been regulated. Two statutes have been enacted relating to the use of accumulations of real and personal property. "Where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the chancellor, upon the application

[1] McCoun, J., Mason v. Jones, 2 Barb. 229, 248, 249, affg. Mason v. Mason's Executors, 2 Sand. Ch. 432.

[2] McCoun, J., Mason v. Jones, 2 Barb. 229, 252. [3] Id.

of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education." [1]

"When any minor, for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support or education, the chancellor, upon the application of such minor or his guardian, may cause a suitable sum to be taken from the moneys accumulated, or directed to be accumulated, and to be applied to the support or education of such minor." [2]

216. When a trust has been created by one person for the benefit of another, which provides for the payment of the income of the fund to the beneficiary, a judgment creditor of the beneficiary is entitled to maintain an action in equity to reach and recover the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust*, and those dependent on him.[3] Long ago Vice Chancellor McCoun declared that when there was no valid direction for the disposition of the surplus beyond what was necessary for the support of the person for whose benefit the trust was created, it was liable in equity to the claims of creditors.[4] In determining the proper amount for the suitable support and maintenance of the beneficiary, the court will consider the manner in which he has been reared, and his habits and

[1] R. S. Part II, Ch. 1, Tit. 2, § 39.

[2] R. S. Part II, Ch. IV, Tit. 2, § 5.

[3] Code of Civil Pro. §§ 1871, 1879; Williams *v.* Thorn, 70 N. Y. 270; Graff *v.* Bonnett, 31 Id. 9; Hallett *v.* Thompson, 5 Paige, 583; Craig *v.* Hone, 2 Edw. Ch. 554, 566; Tolles *v.* Wood, 99 N. Y. 616; Clute *v.* Bool, 8 Paige, 83; Stewart *v.* McMartin, 5 Barb. 438; L'Amoureaux *v.* Van Rensselaer, 1 Barb. Ch. 34. But only the surplus beyond the sum necessary for the education and support of the beneficiary, after this fact has been ascertained, and which has not been applied to his support as it became due, can be taken by creditors. When such a surplus does not exist they can get nothing.

[4] Stagg *v.* Beekman, 2 Edw. Ch. 89, 91.

ability to take care of his property;[1] and the judgment creditor of the beneficiary has a superior lien or right to that of his general creditor or assignee.[2] But neither he[3] nor the beneficiary can anticipate the disposition of his income, or encumber it by any contract, or pledge or transfer previous to its accumulation.[4]

[1] Kilroy *v.* Wood, 42 Hun, 636; Sillick *v.* Mason, 2 Barb. Ch. 79.
[2] Williams *v.* Thorne, 70 N. Y. 270; Tolles *v.* Wood, 99 Id. 616.
[3] Scott *v.* Nevins, 6 Duer, 672.
[4] Graff *v.* Bonnett, 31 N. Y. 9; Williams *v.* Thorn, 70 Id. 270; Scott *v.* Nevins, 6 Duer, 672; Tolles *v.* Wood, 99 N. Y. 616.

CHAPTER IV.

TRUSTS OF PERSONAL PROPERTY.

SECTION I.

PRINCIPLES.

217. We shall now proceed to show how the law regulating the suspension of the power of alienation has been ap-

plied to trusts of personal property. By statute "the absolute ownership of personal property shall not be suspended by any limitation or condition whatever for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator. In all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of this act in relation to future estates in lands."[1]

218. Before stating the rules that have been established in administering this statute some of its peculiarities may be noted. The first of these is the introduction of the term absolute. It "was doubtless used," says Justice Allen, "as the opposite of 'conditional,' and in the same sense as 'perfect.' It signifies without any condition or incumbrance."[2]

219. Another peculiarity is that the duration of the suspension is shorter by a minority than the period for real estate. "The rule is inflexibly established," so Assistant Vice Chancellor Hoffman long ago remarked, "that there can be no limitation of personal estate by which the power of entire alienation shall be suspended for a longer period than the continuance of two lives in being at the death of the testator."[3]

220. Unlike express trusts, which relate to real estate, the objects of trusts concerning personal property are not defined by statute. They may, therefore, be created for

[1] R. S. Part II, Ch. IV, Tit. IV, §§ 1, 2.

[2] Converse v. Kellogg, 7 Barb. 597.

[3] Butler v. Butler, Hoff. Ch. 348; Banks v. Phelan, 4 Barb. 80; McSorley v. Wilson, 4 Sand. Ch. 515; Thompson v. Clendening, 1 Sand. Ch. 387; Manice v. Manice, 43 N. Y. 303, 382.

any purposes which are not illegal. "Independent of the common-law principle of analogy between estates or interests in real and personal property," says Chancellor Walworth, "the statute creates such an analogy by restricting the power of suspending the absolute ownership or the right of alienation, within the same limits; by confining the power of accumulating the income of personal estate, and the rents and profits of real estate, to the same objects and within the same bounds; and, finally, by declaring, in general terms, that in all other respects limitations of future or contingent interests in personal property shall be subject to the rules prescribed by the revised statutes in relation to future interests in lands."[1] These views, thus early announced, have never been questioned. Chief Justice Comstock has remarked: "Trusts in personal estate are subject to no statutory restriction; in other words, the legislature has never attempted to define and enumerate the lawful occasions for creating such trusts. They stand, therefore, as at the common law,[2] subject only to the statutory rule against the suspension of ownership for more than two lives."[3]

221. A trust, therefore, for the employment of money may be created. But if the contract is to exist after the owner's death its duration must never exceed the legal boundary of suspension. In Gilman *v.* McArdle[4] Justice Rapallo remarked that "where money is paid by A. to B.,

[1] Gott *v.* Cook, 7 Paige, 535. "A trust of personalty is not within the statute of uses and trusts and may be created for any purpose not forbidden by law." Rapallo, J., Gilman *v.* McArdle, 99 N. Y. 456, citing Day *v.* Roth, 18 Id. 448. Mason *v.* Jones, 2 Barb. 248.

[2] The whole estate in money and personal property is in the trustees by the common law. Comstock, J., Gilman *v.* Reddington, 24 N. Y. 15.

[3] Gilman *v.* Reddington, 24 N. Y. 12. To the same effect are the remarks of Allen, J., in Holmes *v.* Mead, 52 Id. 343. See also Hagerty *v.* Hagerty, 9 Hun, 176, and De Peyster *v.* Beekman, 55 How. Pr. 90.

[4] 99 N. Y. 451, 461

on the promise of B. to invest or employ it in a specified definite and lawful manner, a valid contract is made, and I can see no reason why the contract may not be to employ the money, in the specified manner, after the death of A. If there is an ascertained beneficiary interested in the performance of the agreement, he can, after the death of A., enforce it as a trust. If there is no such beneficiary, the right to enforce it as a contract, or in case of a refusal to perform, to recover the consideration paid, passes to the legal representatives of A."

222. A trust of this nature may be created without writing, and the delivery of the property is sufficient to pass the title. Any declaration, however informal, evincing the intention with sufficient clearness to form a trust will have that effect.[1]

223. Concerning the form of the trust nothing need be added to what has been said in the early pages of this work.[2] Illustrations are quite numerous, and a reference to these will suffice. Perhaps a single illustration of an implied trust may be worthy of record. In Forsyth *v.* Rathbone[3] the testator directed that his real estate should be converted into money, that annuities should be paid, that the surplus income should be re-invested until his

[1] Day *v.* Roth, 18 N. Y. 448; Gilman *v.* McArdle, 99 Id. 451. "Such declarations," says Justice Comstock, "stand somewhat on peculiar grounds. They are not to be regarded as admissions merely of some antecedent fact in relation to the subject, but are to be looked upon and received as constituting the very trust which they acknowledge. The doctrine of equity is, that by their own force they impress the fund with a peculiar character, and hence they are receivable on the same grounds as a precise and formal agreement. A person in the legal possession of money or property, acknowledging a trust, becomes from that time a trustee if the acknowledgment is founded on a valuable or meritorious consideration. His antecedent relation to the subject, whatever it may have been, no longer controls, and therefore it is not the material fact to be ascertained." Day *v.* Roth, 18 N. Y. 453.

[2] §§ 23–33.

[3] 34 Barb. 388.

youngest grandchild attained majority, and after that the whole income, not required for annuities, should be paid to the grandchildren until the final division of the estate. These acts necessarily implied a trust.

224. The alienation of personal property may be suspended by creating a trust in the same manner as the alienation of real estate.[1] Formerly it was maintained that this could be done only by a contingent limitation.[2] But this doctrine has been overthrown. In Campbell *v.* Foster[3] Justice Wright said: "I regard this case as settling, in this court, the mooted question of statutory construction, making applicable to trusts of personalty the provision prohibiting alienation of the interest of the beneficiary in trusts of land, and as affirming the position of the late chancellor as to the non-alienability of the interest of a beneficiary in a trust to receive and apply the income of personal property to his use." The suspension, therefore, of the power of alienation of personal

[1] "A bequest of the interest or income of personal estate to accrue and be received after the death of the testator is a limitation of a similar interest in personal estate and must be subject to the same rules. The limitation of a trust of personal estate to receive the future interest or income thereof and to apply it to the use of the *cestui que trust* for life or any shorter period, as authorized by the fifty-fifth section of the article of the revised statutes relative to uses and trusts, renders the interest of the *cestui que trust* in such income inalienable according to the provisions of the sixty-third section of the same article. Such a limitation therefore suspends the absolute ownership of the trust fund, as the trustee cannot dispose of the fund absolutely, even with the assent of the *cestui que trust*, without being guilty of a breach of trust. And if the trust to receive and apply the interest or income is so limited as to suspend the absolute ownership for more than two lives in being at the death of the testator such limitation is void." Chancellor Walworth, Hone *v.* Van Schaick, 7 Page, 233.

[2] Forsyth *v.* Rathbone, 34 Barb. 409, citing Kane *v.* Gott, 24 Wend. 661, and Savage *v.* Burnham, 17 N. Y. 561. See dissenting opinion of Denio, Ch. J., in Graff *v.* Bonnett, 31 Id. 15; Grout *v.* Van Schoonhoven, 1 Sand. Ch. 336; Titus *v.* Weeks, 37 Barb. 136; Arnold *v.* Gilbert, 5 Id. 199; Perry *v.* Foster, 62 How. Pr. 228, 230.

[3] 35 N. Y. 361, 372.

property by means of a trust is no longer an open question.[1]

225. When real estate is to be converted into personal property, the law will regard the trust as consisting of personal property, and dating from the testator's death, unless there is something special in the power of sale making its exercise or performance depend on the happening of some event or later contingency.[2] This principle of conversion is founded on the broader rule of construction that whatever in a will or other instrument is directed or agreed to be done is considered in equity as executed.[3] But what order or direction shall be considered adequate authority to effect a conversion? Three rules may be given: (1) a positive direction either express or implied.[4] (2) A request united with a scheme for the distribution of property which requires or necessitates a conversion to execute it.[5] But (3) a discretionary power, which the

[1] Graff *v.* Bonnett, 31 N. Y. 9; Roosevelt *v.* Roosevelt, 6 Hun, 31; Cutting *v.* Cutting, 86 N. Y. 522; Lent *v.* Howard, 89 Id. 169, 181; Cook *v.* Lowry, 95 Id. 103, 111; Tolles *v.* Wood, 99 Id. 616; Knox *v.* Jones, 47 Id. 396; Hallett *v.* Thompson, 5 Paige, 583; Gott *v.* Cook, 7 Id. 521, affd. 24 Wend. 641; Clute *v.* Bool, 8 Paige, 83; Hone *v.* Van Schaick, 7 Id. 221; L'Amoureaux *v.* Van Rensselaer, 1 Barb. Ch. 34; Stewart *v.* McMartin, 5 Barb. 438; Smith *v.* Edwards, 23 Hun, 229; Bramhall *v.* Ferris, 14 N. Y. 41; Wells *v.* Wells, 88 Id. 331; Degraw *v.* Clason, 11 Paige, 136; Bean *v.* Bowen, 47 How. Pr. 306; Genet *v.* Foster, 18 How. Pr. 50; Manning *v.* Evans, 19 Hun, 500, 502; Matter of Rutherford, 5 Dem. 499; Matter of Hoyt, Id. 432, 442.

[2] Arnold *v.* Gilbert, 5 Barb. 190, 196; Bramhall *v.* Ferris, 14 N. Y. 41; De Peyster *v.* Clendining, 8 Paige, 295; Savage *v.* Burnham, 17 N. Y. 561; Chamberlain *v.* Chamberlain, 43 Id. 431, 432; Dodge, Ex. *v.* Pond, 23 Id. 69; White *v.* Howard, 46 Id. 162; Wells *v.* Wells, 88 Id. 323, 331; Kane *v.* Gott, 24 Wend. 659; Smith *v.* Kearney, 2 Barb. Ch. 533; Burrill *v.* Sheil, 2 Barb. 457.

[3] Arnold *v.* Gilbert, 5 Barb. 196; Craig *v.* Leslie, 3 Wheat. 563; Kane *v.* Gott, 24 Wend. 660.

[4] Hobson *v.* Hale, 95 N. Y. 588; Arnold *v.* Gilbert, 5 Barb. 190; Henderson *v.* Henderson, 113 N. Y. 1.

[5] Cruishank *v.* Home for the Friendless, 113 N. Y. 337, affg. 18 Abb. N. C. 282; Lent *v.* Howard, 89 N. Y. 169; Moncrief *v.* Ross, 50 Id. 431.

trustees may or may not exercise, and which does not form a necessary element in a scheme for distribution, is not an imperative authority for making a conversion and does not accomplish that result.[1]

226. We may add that until the time has come for making a conversion, a trust in real estate is governed by the law relating to that kind of property.[2]

227. The duration of the suspense in a trust of personal property must be founded on lives, like a trust in real estate. No term of years, however short, will satisfy the statute.[3] But this plain rule has not always been regarded. Thus, a testator directed that if his trustees after settling his estate should have enough left to found a school, they should petition the legislature of the state to accept the devise for the purpose of endowing and supporting the school, and to enact the needful regulations therefor. If these could not be obtained, then the trust-

"A power or authority to sell is given, but unless the exercise of that power is rendered necessary and essential by the scope of the will and its declared purpose, the authority is to be deemed discretionary, to be exercised or not, as the judgment of the executrix may dictate, and so an equitable conversion will not be decreed. White *v.* Howard, 46 N. Y. 162. To justify such a conversion there must be a positive direction to convert, which, though not expressed, may be implied ; but, in the latter case, only when the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt. Hobson *v.* Hale, 95 N. Y. 588. Where, however, only a power of sale is given without explicit and imperative direction for its exercise, and the intention of the testator in the disposition of his estate can be carried out, although no conversion is adjudged, the land will pass as such and not be changed into personalty." Finch, J., in Scholle *v.* Scholle, 113 N. Y. 270.

[1] Chamberlain *v.* Taylor, 105 N. Y. 194 ; White *v.* Howard, 46 Id. 162, and 89 Id. 169 ; Scholle *v.* Scholle, 113 Id. 270 ; Harris *v.* Clark, 7 Id. 242 ; Wright *v.* Trustees, Hoff. Ch. 202 ; Stagg *v.* Jackson, 1 N. Y. 206 ; Henderson *v.* Henderson, 113 Id. 1 ; Newell *v.* Nichols, 75 Id. 78 ; Sage *v.* Lockman, 53 How. Pr. 276.

[2] Savage *v.* Burnham, 17 N. Y. 561.

[3] Smith *v.* Edwards, 23 Hun, 229 ; Converse *v.* Kellogg, 7 Barb. 590 ; Rose *v.* Rose, 4 Abb. Ct. of App. Dec. 108 ; Schettler *v.* Smith, 41 N. Y. 328.

fund was to accumulate until reaching one hundred thousand dollars, when the trustees were to form the institution in any state on the conditions prescribed in the trust. This trust created an illegal suspense, for no lives were designated, nor did life in any form enter into the limitation.[1] In Leonard *v.* Bell[2] the trusteee were to have an academy incorporated and to convey land thereto, which was to be purchased by them. This created an unlawful suspension, Judge Ingraham saying that there were no lives mentioned in the trust, the suspension being until the academy was incorporated, which event might not take place. The suspension, therefore, would be indefinite. In another case a legacy was to be paid to erect a college on the condition that twice the amount specified should be contributed by others. This clearly transgressed the statute.[3]

228. A trust in personal property, like one in real, is separable and thus some parts may be sustained while others, which contravene the law, must fail. No better statement of the doctrine probably exists than Chancellor Walworth's. "In trusts of personal estate, or of money that is infinitely divisible in its nature, a suspension of the absolute ownership as to one part of the fund for a longer period than is allowed by the law, will not make void the disposition which has been made of another part thereof. As the statutory rules as to limitations of future contingent interests in lands are applicable to similar interests in personal property, any limitation of a future interest or use in any particular portion of a personal fund, which would have the effect to suspend the absolute ownership of that part of the fund for a longer

[1] Yates *v.* Yates, 9 Barb. 324; King *v.* Rundle, 15 Id. 139; Dodge, Executor *v.* Pond, 23 N. Y. 69.

[2] 1 T. *v.* C., 608, affd. 58 N. Y. 676.

[3] Dodge, Executor *v.* Pond, 23 N. Y. 69.

period than is allowed by law, would be absolutely void in its creation. But it does not follow from this, that every interest which has been created in that particular part of the fund is also void, if it is in the nature of a separate and distinct estate or interest therein. And as the revised statutes have not prohibited express trusts of personal property for any purposes which are legal, it follows of course that where personal estate is vested in trustees upon various trusts, some of which are valid and others void, the courts must sustain those which are legal and valid if they can be separated from those which are illegal and void."[1]

229. By thus dividing the trust in Westerfield *v.* Westerfield[2] the portion which was for the benefit of two persons was saved, while another portion of the trust, which was for the benefit of three, was declared invalid. In Field *v.* Field[3] the trust could not be separated. The testator, on this occasion, left seven children, five sons and two daughters. The trustees were to support them from the income of the estate until they were twenty-two. Then the sons were to receive ten thousand dollars apiece, and three years afterward half as much more. The daughters were to receive three thousand dollars apiece when married, or were twenty-two years old. The sons were to receive five-sevenths of the remainder when they reached thirty. The daughters were to receive the income on their shares during life and then they were to descend to their respective heirs. The absolute ownership of the sons' shares in the residue was therefore suspended until they respectively reached the age of thirty, nor were these shares divisible or separable; five-sevenths of the residue, therefore, was suspended for a fixed period of time without regard to lives.

[1] Van Vechten *v.* Van Veghten, 8 Paige, 128.
[2] 1 Bradf. 137.
[3] 4 Sand. Ch. 528.

230. In McSorley *v.* Wilson[1] the trust-maker, after giving the trustees discretionary authority to sell the real estate, directed them to pay an annuity from the income to his mother, and also one-third of the net income to his wife, for life. The residue was to be divided into three equal parts, and one of these they were to pay to the trust-maker's son J. for life, and if dying without children then his share was to vest in the trust-maker's surviving children. Another third was devised on the same conditions to his daughter A. The other third was to be paid to his daughter M. if she survived her mother, and until that event was to be paid to her mother annually. If M. died before her mother, the income from her share was to go to her children after her mother's death, and if leaving none to the testator's children. At any time after the conversion of the estate the children, J. and A., could draw their shares if they desired. At the death of his wife the third of the income which was given to her, was to fall into the residue of the estate, which was given to persons in whom the title would then vest. The devise of this portion did not create an excessive suspense, but it was invalid with respect to the other portions.

231. Many trusts have been saved on the ground that the beneficiaries shared as tenants in common, and that the period of suspense for the vesting of the shares did not contravene the statute. In Moore *v.* Hegeman[2] if the three children of the testator survived him, the trustees were to divide the residue of the estate into three equal shares, and one of them was to be held in trust for each child during life. The share of the child who died first was to go in fee to his lawful issue if having any, if not, then it was to be divided into two equal parts, or sub-shares, one of which was to be held in trust for each

[1] 4 Sand. Ch. 515.

[2] 72 N. Y. 376.

of the surviving children during life, and at the death of the next, or second child, such sub-share was to go in fee to his lawful issue, or if having none then to the person who, if the surviving child were dead, would be his heirs-at-law. A provision of similar character was made concerning the third child, or one who died last. The estate, therefore, was divided into three shares, and disposition was made of each share respectively, consequently there was no illegal suspension of ownership.

232. In Matteson *v.* Armstrong[1] the trustee was to receive the income, and after paying legacies and annuities was to pay the remainder to the trust-maker's widow during her life. On her death he was to pay from the income and sale of the real estate, and also from the income of the personal, to a son and daughter of the trust-maker, one thousand dollars in two annual payments, which was to be done one year after the death of his wife. The same sum was to be paid to a grandchild if he should live to be twenty-one, though in no event until one year after the death of his wife, and an annuity was given to him during his minority. "After the payment and discharge of these legacies" the real and personal estate was to be divided between son, daughter and grandchild "as speedily as the same can be converted or divided." This trust ended when the wife died, and the children and grandchild became entitled to the possession and enjoyment of the property as tenants in common, subject to the power of converting, dividing and selling it, consequently there was no unlawful suspense of the power of alienation.

233. In Wells *v.* Wells[2] a trust was created which was to last during the lifetime of the trust-maker's wife and children. She was to have one-third of the income, and

[1] 11 Hun. 245. [2] 88 N. Y. 323.

the children the other two-thirds. After her death her portion of the income was also to be divided equally among the children. On the death of any child leaving issue his share or portion was to be paid to his issue. Thus the trust for no portion of the estate was to last longer than during two lives, those of the widow and one child, and was valid. The estate, though consolidated under one trust, was regarded as an estate for the seven children of the testator, for each of whom a separate trust had been created. This construction was in harmony with that first adopted in Savage *v.* Burnham,[1] and which has been followed in other cases.[2]

234. In another case[3] the trust-maker directed that one-half of the principal and interest of the trust fund should be for the benefit of a grandson's children, and the other half of a granddaughter's. One-half of the income was to be applied annually for the benefit of the children of each grandchild respectively. Whenever either of the children of the grandson or granddaughter should come of age, the trustee was to pay over to that child his proportion of the one-half of the principal. Each of the great grandchildren living at the testator's death took an immediate vested interest in an equal share of the fund bequeathed to the children of his parent subject, first, to be diminished in quantity by the birth of subsequent children before the first child of the class became of age; secondly, that if the uncertainty of the quantity of interest of the children in being at the testator's death would suspend the power of alienation, it could only endure for one life in being at the creation of the estate, that of the parent, consequently there was no illegal suspense.

[1] Savage *v.* Burnham, 17 N. Y. 561.

[2] Stevenson *v.* Lesley, 70 N. Y., 512; Monarque *v.* Monarque, 80 Id. 320. See also Bruner *v.* Meigs, 64 Id. 506.

[3] Tucker *v.* Bishop, 16 N. Y. 402.

235. In the matter of Verplanck a will contained a bequest of thirty thousand dollars in trust "to pay over the net income of ten thousand dollars, part of such sum," to each of three unmarried nieces of the testator, who were named, "so long as each remains single; upon the marriage of either to pay over to her one thousand dollars of the principal of which she has enjoyed the income," and to pay over the residue of the ten thousand dollars to the testator's surviving nephews and nieces. This trust did not create an unlawful suspension, for the legatees were interested as tenants in common in the thirty thousand dollars, "and took distributively and not jointly." Although the whole sum was given *in solido* to the executors, and they were required to invest it, each of the legatees was interested in only ten thousand dollars and was to receive only that amount.[1]

236. Oxley *v.* Lane[2] is another illustration of eliminating some of the limitations and preserving the remainder. The testator created an express trust, but the principal bequests in controversy were not thus enveloped. The rule of construction was stated in the following language by Justice Smith: "If effect cannot, consistently with the rules of law, be given to the entire will, or an entire provision in a will, any part of it may be sustained which is conformable to the rules of law, and which can be separated from the residue without doing violence to the testator's general intention."[3] In this case the testator divided his estate among his children and grandchildren in shares. They were to have the use of the

[1] 91 N. Y. 439, the court citing Everitt *v.* Everitt, 29 Id. 39; Moore *v.* Hegeman, 72 Id. 376; Monarque *v.* Monarque, 80 Id. 320.

[2] 35 N. Y. 340, 349.

[3] Citing Kane *v.* Gott, 24 Wend. 641, 666; Parks *v.* Parks, 9 Paige, 107, 117; De Kay *v.* Irving, 5 Denio, 646; Lang *v.* Ropke, 5 Sand. 363, 371; Williams *v.* Williams, 8 N. Y. 525, 539; Savage *v.* Burnham, 17 Id. 561, 572.

personal property at once, but not the property itself until twenty-five years after his death. To accomplish this result he created remainders, whereby the share of a child who died during this period should be shared equally by the survivors. The remainders which the children were to receive on the death of the first child were declared valid, for the power of alienation would not be suspended for more than two lives, but it could continue no longer. The limitation, however, beyond the death of the first child could be separated and dropped without effecting the primary disposition of the estate.

237. The ownership of personal property as tenants in common, or joint tenants, is determined by the same rule as real estate. The statute does indeed mention only real property, but the rule applicable to this has been applied to personal property. The English doctrine does not prevail in this state though it was applied on one occasion.[1] In the matter of Lapham[2] the law has been reviewed by Justice Bradley.

238. Nor is the existence of a separate trust jeopardized by the non-severance of the fund, from which the several trusts are fed, into separate shares. This question has received judicial consideration on several occasions. In Vanderpoel *v.* Loew[3] a common fund existed for supporting four separate trusts. The fund was to be preserved without division, yet the shares were declared to be separate and distinct, and the trust for each share was terminable at its own date, so that the trust as a whole was for four different periods and in four different divisions or sections. In this case it was contended that the separation indicated by the testator was of undivided

[1] Putman *v.* Putman, 4 Bradf. 308.

[2] 37 Hun, 15. See also Blanchard *v.* Blanchard, 4 Id. 287, affd. 70 N. Y. 615; Lane *v.* Brown, 20 Hun, 382, 387; Manice *v.* Manice, 43 N. Y. 382; Everitt *v.* Everitt, 29 Id. 71.

[3] 112 N. Y. 167, 180.

fourths showing that the trust fund was to be kept together, and not in truth to be divided into four separate principals. But the court, speaking through Justice Finch, declared that was "not a difficulty in the way of a severance of the trusts.[1] In many cases where, as in this, income and principal were given in equal shares, although out of one fund kept *in solido* for convenience of investment, a severance of the trust into its component parts has been adjudged.[2] The shares and interest are several, although the fund remains undivided."

239. In creating substituted remainders there is danger of violating the law under consideration. The estate may be so devised that portions may possibly run through more than two lives. One of the recent examples of a substituted remainder is Vanderpoel *v.* Loew.[3] The testator created a trust for the benefit of four children and a grandchild. The trust for each was separate, though the fund from which the income was devised was kept *in solido*. If one of the five died without issue his share was to be divided among the survivors. This provision applied to all. If, therefore, one died, one-fourth of his principal would go to each of the other four. Suppose another child should die, what then? His share would be divided among the other three. They could hold this, for even then it would be held by only two lives. And the

[1] Manice *v.* Manice, 43 N. Y. 303.

[2] Savage *v.* Burnham, 17 N. Y. 561; Stevenson *v.* Lesley, 70 Id. 512; *In re* Verplanck, 91 Id. 443; Hillyer *v.* Vandewater, 24 N. E. Rep. 999. "There is indeed but one fund, which is embraced in a single trust, but the interests carved out of it are entirely distinct. The trust itself is necessarily divisible as often as the beneficial dispositions of the will call for a division and separation of any portion of the estate from the residue. When the share of any beneficiary vests according to the will and becomes payable, it is the duty of the trustees to pay it over accordingly, and the trust as to that share at once ceases." Comstock, J., Savage *v.* Burnham, 17 N. Y. 571.
at once ceases." Comstock, J., Savage *v.* Burnham, 17 N. Y. 571.

[3] 112 N. Y. 167.

same thing would happen if all the children died except the last.

240. But there is another difficulty in the way of saving shares in such a case which remains for notice. Let us call these five children A., B., C., D., E. A. dies and his share is divided among the other four. They can hold this, for the suspension would be only for two lives. But afterward B. dies, and his share consists of his original share, which he has enjoyed for a life, and one quarter of B.'s share which has been enjoyed by B. and himself. Evidently the statute has been spent with regard to this quarter, and, therefore, in the event of B.'s death the title can be kept no longer suspended, for the extreme limit has been reached. The trust in this case was saved on the ground that it was not to be presumed, in the absence of an express direction, that the testator intended that the fraction of a secondary share, when set free by the death of the second child, should go again into the common fund, but that the fraction thus added to the life estate of each of the other children would vest in each case on the death of the owner and so become alienable at the end of two lives in being.

241. Does this rule, regulating the suspension of alienation, apply to a fund which is kept in trust as security for certain purposes? For example, a stock exchange organization fixed the price of its seats at one thousand dollars apiece. This sum was to be invested in a bond and held by a trust company, and could be taken only for the debts between the members and the trust company and the exchange; and the seats could be sold subject only to the rules of the board. This trust did not violate the statute.[1]

242. When annuitants are term-measurers the validity of the trust is determined by the same rule as in other

[1] Brown v. The Mutual Trust Co., 22 N. Y. Week Dig. 395.

trusts. Of cases of this character Bulkley *v.* Depeyster[1] is one of the earliest. The testator bequeathed annuities to each of his five children, and if any one should die without issue his annuity was to be equally divided among the others. If, however, the child left issue the annuity was to be paid to his issue while the testator's wife should live, and the principal after her death. If any child should die after his mother, his portion was to be paid to his issue, and a final distribution was to be made after the death of the fifth child. Each portion was not suspended beyond two lives, those of the wife and the child to whom it was given, and consequently did not exceed the statutory limits. On the death of these two the grandchildren took an absolute interest in the shares. In another case[2] the testator directed his trustee to pay annuities to two persons for life and an annuity to another as long as she was unmarried. The trustees were to hold enough principal to raise these annuities until the death of the annuitants when the respective principals would fall into the residuum of the estate. These were valid. The same testatrix provided that her executors should pay one-third of the net annual income of the residue of her estate to each of her three children for life, and at the death of any one of them to pay or transfer one-third of such residuary estate as such child should appoint in his will, and in default of such appointment then to his issue, and in the event of the failure of both appointments and issue then the income of such share was to be paid to her children then surviving, for their lives, and on their death to go by appointment or otherwise in the way provided for the original share. There was an unlawful suspension of the principal of these annuities.

[1] 26 Wend. 21, affg. 8 Paige, 295.

[2] Murray *v.* Murray, 23 N. Y. Week. Dig. 563.

243. A trust to receive the rents and profits of real estate and to pay annuities to two sons of the testator for five years, if they should live so long, and to pay the surplus rents and profits to one of them is valid, and will continue for the specified period notwithstanding the death of one of the annuitants within that period unless it is terminated by the death of the other.[1]

244. One of the most interesting cases involving an application of this principle is that of Mason *v.* Jones.[2] The testator gave an undivided half part of his real and personal estate in trust, and from the income the trustees were to pay annuities to each of his three sons, A., B. and C., and his daughter. The annuity to her was to cease if she survived her husband, and she was to take one-fourth of the trust property absolutely. If he outlived her he was to receive the annuity for life, and her fourth, subject to this annuity, was to vest in her issue by representation. If B. or C. died leaving a widow she was to have her husband's annuity for life. The trustees had discretionary power to increase the annuities to the sons and daughter. If the net income exceeded the annuities the surplus was to accumulate equally for the benefit of the children of the daughter and the sons of B. and C. during their minorities. So long as these three were without issue the surplus was to be paid to seven of the testator's eight children equally. On A.'s death one-fourth of the trust-fund, with the surplus, was to go to his brothers and sisters above mentioned. On the death of B. and C. two other fourths were given to their issue, subject to the annuities above mentioned. But if they left no issue then these two-fourths were to go to the issue of the other brothers and sisters. The question was, did the trustees

[1] McCosker *v.* Brady, 1 Barb. Ch. 329.

[2] 2 Barb. 229, affg. 2 Sand. Ch. 432.

take this trust-fund as an entire gift, or was it to be regarded as composed of several trust-funds? If the latter interpretation prevailed, the devise did not create an unlawful suspense. And the instrument was interpretated as creating four trust-funds.

SECTION II.

APPLICATION OF PRINCIPLES TO DETERMINE THE RIGHTFUL NUMBER OF LIVES.

245. We shall close this chapter with a review of the cases in which the question was raised whether the trust was properly restricted to the number of lives prescribed by the statute. The first of these is Beardsley *v.* Hotchkiss.[1] L. made a trust whereby she retained a life interest in her real and personal estate. She also made a will and bequeathed her property to five children, but if one of them died before attaining majority and left no issue, his share was to go to the others. One child died after the testator's death, before he was of age, leaving no issue. The court decided that there was no illegal suspension of the power of alienation of either the real or personal estate. "The bequest of personal property [to the child who died] with a limitation over in case he should die without issue during minority was a valid limitation, and it did not unduly suspend the absolute ownership of the property. All the other children could have executed

[1] 96 N. Y. 201.

a valid release of their interest in such property to [the child who died] and then he could have conveyed an absolute title thereto, or they could all have united and conveyed an absolute title to any one."[1] It must be remembered that after the death of one person, the testator, the property was no longer inalienable. But if two lives had interposed, a contingent limitation over of the personal estate in the event that a child should die leaving no issue would not have been valid, for the ownership of personal estate is bounded absolutely by two lives in being, and not two lives, and a minority, like real estate.

246. In Knox *v.* Jones[2] the trust-maker gave the income to A. during life, and on his death it was to be divided equally and paid to B. and C. during life, and after C.'s death the property itself was to be paid to legatees. Thus it was not to vest until the death of three persons and was, therefore, void. In Goodwin *v.* Ingraham[3] the testator gave fifty thousand dollars in trust to his five children. This was void because it suspended the absolute ownership of the fund beyond two lives in being at the creation of the trust estate. In Shipman *v.* Rollins[4] the testator directed his trustee to pay portions of the income flowing from an investment to A. and B. and the residue of the income to an association, unless his sister should become a widow, in which event it was to be paid to her. After their death the principal was to be paid to an association. This was a suspension for three lives, and consequently the trust was void.

247. In Savage *v.* Burnham[5] the testator provided that the share of each son dying under twenty-one and of each daughter dying without issue, should go to the surviving children and be divided equally among them. This limi-

[1] Gott *v.* Cook, 7 Paige, 521, 543.
[2] 47 N. Y. 389.
[3] 29 Hun, 221.
[4] 98 N. Y. 311.
[5] 17 N. Y. 561.

tation violated the statute, because that was already exhausted by the suspension of alienation during the life of the widow, and the life of the son or daughter, in other words, of the first taker of each share.

248. B. created a trust in which she directed that the income of her personal property should be paid to her sister A. during the joint lives of herself and her husband. If A. survived her husband she was to take the principal, if she died before him leaving children, the income was to be paid to them until the youngest should reach the age of twenty-one, and then the principal was to be paid to them. If A. left no children, or all died before attaining their majority, the fund was to go to another sister and brother. At the time of B.'s death A. had no children living. Even if she had not survived her husband and had left children the limitation would not have been valid, because they were not living when B., the trust-maker, died. The consequence was, B.'s direction to pay the fund to such children in the event mentioned, or on their failure to reach majority to pay it to B.'s brother and sisters, was contrary to the statute.[1]

249. In Titus *v.* Weeks[2] a testator directed that his property should be converted into personal estate, and in that form be kept during A.'s minority, while all the interest was to be paid to the testator's four nephews equally. When A. should arrive at full age, one-half of the fund, which in computation was also to include the interest paid as above mentioned, was to be equally divided among the four nephews. The interest on one thousand dollars of the other half was to be paid to B. during life and the principal, after his death, to his children. Two thousand dollars was given to C., and three-fourths of the residue of this half was given to B.'s children, and the other

[1] Greenland *v.* Waddell, 116 N. Y. 234, 244.

[2] 37 Barb. 136.

fourth to a sister of the testator's. It was held (1) that A., who died before he was twenty-one, did not measure an uncertain period dependent on life, but a definite term which was not completed until the time when A. would have become twenty-one had he lived. (2) The absolute ownership of the estate was not suspended by the direction concerning the bequest of interest to the nephews. They took an absolute interest in the legacies given to them, and they were vested though the time of paying them was deferred. The interests of B.'s children were also vested, while the bequest to B. himself was sustained. Nor did his life estate prevent the interest of his children therein from vesting, or render the fund itself inalienable.[1]

250. In Jost *v.* Jost[2] the trustee was to pay the income of an estate to the testator's widow for life, and after her death a legacy to the plaintiff when he became twenty-one, and if he died sooner, leaving no issue, to the defendant. The latter, also, was to receive the residue of the estate. The trust estate ended with the widow's death, and did not, therefore, create an unlawful suspension. In Storm *v.* Storm[3] the testator gave the income of his personal estate to his two sons for life, and on the death of either son the trust was to continue for the benefit of his children till the death of the other. Then the property was to be equally divided among the testator's grand children. This created no illegal suspension. In another case[4] a trust-maker directed that the income of some personal estate after P.'s death should be devoted to the use of four designated beneficiaries, or the survivor or survivors, in specified portions, and the principal was to be paid to them, "or survivor or survivors" in the same pro-

[1] In Donaldson *v.* American Tract Society, 1 T. & C. Addenda, 15, the trust was to last for four years and was invalid.

[2] 22 Alb. L Jour. 135.

[3] 4 N. Y. State Rep. 670.

[4] Van Cott *v.* Prentice, 104 N. Y. 45.

portions when the youngest became twenty-one. It was decided that the survivorship was that existing at the death of the trust-maker, and consequently that the absolute ownership was suspended only during the continuance of two lives who were in being when the trust was created, one was P. and the other was the trust-maker's youngest child.

251. In Levy *v.* Hart[1] the trustee, after applying the income and principal of the property, also, if necessary to support the trust-maker's wife and children, was required, when the youngest child became twenty-one, or on the death of M. and A., the two youngest, (should they die before that time) to convey to the children then living and to the trust-maker's wife, or to those who might be living, and to the descendants of those who were not, the remainder of the property in equal proportions. The effect of the language was, said the court, that the trust must continue until the youngest child then living became twenty-one, if that age was reached within the lifetime of M. and A. "If it should be, then the trustee must convey to the plaintiff's wife and children, even if all of them should at that time be living. If that age shall not be attained while M. and A. are living, then at their decease he must convey, if every one of the surviving children at that time continue to be minors. There can be no possibility, therefore, of the estate of the trustee extending beyond the duration of the two designated lives, and it is not within the prohibition of the statutes relating to future estates in lands or the suspension of the ownership of personal property."[2]

252. In Ward *v.* Ward[3] the testator, after the death of his wife, gave the use and income of all his estate to his two sons, share and share alike, and on the decease of his

[1] 54 Barb. 248. [2] Id. Daniels, J., 261. [3] 105 N. Y. 68.

sons he gave to their heirs, should both have them, their father's portion only, and in case of one having no heirs, then to the heirs of the other, and if both had no heirs then as the law directs. The court held that an unlawful suspension was created, as the testator provided for the devolution of the share of the child dying to the heirs of that child, if there should be any, and if there were none, then the share was to be held by the trustee for the children of the other son, consequently it could not terminate until it was certain that neither son would have issue, which would prolong the trust during the existence of the wife and the two sons, or three lives.

253. In Butler *v.* Butler[1] the testator gave a portion of his estate to his trustee, who was to pay the income to S. until her eldest child became twenty-one. The fund was then to be divided into as many shares as she had children, one of which each child was to receive when he attained his majority. The suspense was for only one life and consequently was authorized.

254. In Smith *v.* Edwards[2] the testator bequeathed to every grandchild that might be born within twenty years after his death, and before the final settlement of his estate, one thousand dollars. This was to be paid to them when they became of full age, or sooner if any of them were granddaughters and married. The testator left two sons, three daughters and four grandchildren who died after the testator. The bequests to the grandchildren were valid, and created no unlawful suspension of the absolute ownership of the property. The reasoning of Justice Gilbert is worth giving: "All those legacies are present gifts of separate and distinct portions of the testator's property, and all of them must necessarily take effect

[1] 3 Barb. Ch. 304. The will was construed differently by Assistant Vice-Chancellor Hoffman eight years before this. Hoff. Ch. 341. See § 305.

[2] 23 Hun, 223, affd. 88 N. Y. 92.

completely within the period of one life in being at the death of the testator. The legacies to the grandchildren *in esse* vested immediately upon the death of the testator. That to the grandchild, who was born after the death of the testator, vested immediately upon her birth, and if any grandchild shall be hereafter born, the legacies to them will vest in like manner. As to the grandchildren who were living when the testator died, there was not a moment's suspension of the absolute ownership of the money given to them respectively, and as to the others, the suspension could not possibly last beyond one life in being, namely, that of the parent, who was a child of the testator. It is true that the offspring of a son of the testator might not be born until months after the death of its father. Still, the gift would be valid for two reasons. 1. It was dependent only upon the life of the father. 2. A child *en ventre sa mere* must be treated as having been living at the death of its father."[1]

255. In Manice *v.* Manice[2] the testator created trusts of real and personal property. The income was to be received and applied during the life of his widow. After her death the property was to be divided into shares; and each daughter was to receive a share of the income and apply it to her use during her life, and after her death her part was to be divided into equal shares for her children living at the time of her death, and which were to be retained and accumulate during their minority. Then the sums due were to be paid to them with the accumulations. Contingent limitations over were also created of the share of a child who might die during minority. The contingent remainders, and the trust for accumulation of the real estate were valid, but not of the personal, because the absolute ownership was suspended during two lives and a minority. Said Jus-

[1] Mason *v.* Jones, 2 Barb. 252.

[2] 43 N. Y. 303, 381.

tice Rapallo: "The limitation over in case of the death of a daughter's child during minority, suspends the absolute ownership of each daughter's share of the personal property beyond the lives of the widow and daughter, and during the minority of the daughter's children, if she leaves infant children her surviving; and we think the exception in section sixteen, which permits that suspension in case of real estate, is not applicable to personal property." It was not the limitation over in that case alone that created the mischief, but the fact that it was preceded by two lives during which the absolute ownership was suspended.

CHAPTER V.

CONTINGENT LIMITATIONS.

SECTION I.

PRINCIPLES.

256. The original mode of creating a suspension by means of a future estate, which could not vest until the happening of a prospective event, may now be described. As the vesting of the estate was postponed until the event happened, and no alienation could be previously made, the power of alienation was effectually suspended

until the happening of the event.[1] Stated negatively, when an estate is vested there is no suspension.[2] Thus, in Beardsley *v.* Hotchkiss,[3] L., who intended to marry H., made a contract with him and W. in trust for her separate use during life. By this contract she could bequeath her property to H. or to her children, as she pleased. She died leaving five children to whom she bequeathed all of her real estate, but if any child should die before reaching twenty-one and leave no issue, the other children were to receive his share. One of them, N., died afterward, before he was of age, leaving no issue. The antenuptial contract suspended the power of alienation only during the mother's life. At her death all of the children were in being who could take the estate, and they took the whole of it. N. took a present vested estate in his share, which he could convey, and the other children took a contingent remainder in the same share which they could convey; all then could unite and convey an absolute fee in possession.

257. In Tracy *v.* Ames[4] the testator devised his estate to his wife for her use until the youngest child became twenty-one, or, if not attaining that age, until the next youngest should reach that age, when one-third was to go to the widow and the remainder to the children. There were three of them. It was decided that the widow took an estate of inheritance in one-third of the real estate, and for years in the other two-thirds; and the children a vested remainder-in-fee descendible, devisable and alienable by them. In another case[5] a testator gave to his wife for life the income of his real and personal estate, and after her death to A. for life, from which she was to support three children, B., C. and D. After A.'s death the

[1] Everitt *v.* Everitt, 29 N. Y. 71. [2] § 2. [3] 96 N. Y. 201.
[4] 4 Lans. 500. [5] Emmons *v.* Cairns, 3 Barb. 243.

income was given to the children for life as joint tenants, and the residue to D. after bequeathing to her fifty thousand dollars when she should become twenty-one. The testator directed that if D. should die without children, the residue was to go to his cousins. The court decided that the widow's estate was alienable, and so was A.'s, subject to the charge for the support of three children. Consequently no suspension was created.

258. The case of Bailey *v.* Bailey[1] is noteworthy. A testator created a trust for two lives, A. and B., and after their death the property was to be divided among four persons. His widow, however, was to have the use and income of a portion during her life, and after her death it was to become a part of the residuum which was to pass as above described. It was claimed that the land did not vest until the death of three persons, the widow, and A. and B., and consequently that an illegal suspension of the power of alienation existed. But the court maintained that the gift of the use and income of the land to the wife "was equivalent to a devise of the land itself during the life of the widow, and she had a legal title and was entitled to possession of the same.[2] Under the circumstances the estate devised to the widow was a life estate and was transferable. * * The fee in the house and lot was vested in the persons [named in the will] and being a future expectant estate upon the death of the testator they could immediately convey the fee."

259. In Crooke *v.* County of Kings[3] a testatrix gave the use of all her real estate to her daughter during life, and appointed her husband trustee of the same. If the daughter did not dispose of it by grant or devise, it was to go to her children. The daughter, however, did ap-

[1] 97 N. Y. 460.

[2] Monarque *v.* Monarque, 80 N. Y. 320, 324; Craig *v.* Craig, 3 Barb. Ch. 76.

[3] 97 N. Y. 421, 445.

point him trustee to receive the income and apply the same for the education and support of her children during his life. After his death they were to have the property. She also authorized him to sell the estate "in fee or lesser estate," and he sold the property. The purchaser's title was assailed on the ground that it unduly suspended the power of alienation. The court answered, speaking through Justice Finch: "The objections turn upon the provision allowing the trustee to sell in fee 'or a lesser estate.' It is argued that the power authorizes the creation of another life estate, and since it must date back to [the first] will, and be treated as if therein written, we have, first, a trust estate for the life of [the daughter]; second, a trust estate for the life of [her husband]; and third, a life estate in his vendee. But the last life estate would be alienable at the moment of its creation, and add nothing to the suspension of the power of alienation. At the end of the two trust estates the life tenant and the remaindermen would have legal estates which they could at once transfer. If the three successive life estates preceding the remainder proved inadmissible, the only effect would be the destruction of the third. And that leads to another answer to the difficulty suggested. The 'lesser estate' might be for the life of the trustee and so keep the suspension within two lives, or for a term of years within his own life by express stipulation; and notwithstanding Root *v.* Stuyvesant[1] we are not to assume, when a lawful estate can be created under the power, that an unlawful one was intended to be authorized."

260. It is a well known rule of construction that when a devise has been made to a person in fee and in case of his death to another, the contingency of death is that of

[1] 18 Wend. 257.

the first named devisee during the lifetime of the testator; consequently if he survives the testator he takes an absolute fee. The words of contingency do not create a remainder which is to take effect on the death, at any time, of the first taker, nor do they create an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the testator's death. This construction is uniformly adopted unless there is some language in the will indicative of a different intention on the part of the testator.[1]

261. The reason for this artificial construction is, as death is a certain event and the time only is contingent, the words of contingency in a devise of this nature can only be satisfied by referring them to a death before some particular period, and, no other being mentioned, the time must be presumed to have been the testator's own death. It is also founded on the principle that in construing wills, effect should be given, if possible, to all the words used by the testator, and that any other construction than the one adopted would in every case reduce the estate of the first named devisee to an estate for life, for his death at some time is certain, and the words of the inheritance attached to the devise to him would in every case be inoperative.[2]

262. Moreover, the same rule is applied when the devise is not dependent solely on the death of the first named devisee, but also on some collateral event as death without issue, or without children. But the ten-

[1] Matter of N. Y., Lackawanna and Western R. Co., 105, N. Y. '89, 92; Vanderzee *v.* Slingerland, 103 Id. 47; Kelly *v.* Kelly, 61 Id. 47; Livingston *v.* Greene, 52 Id. 118; Embury *v.* Sheldon, 68 Id. 227; Moore *v.* Lyons, 25 Wend. 119; Briggs *v.* Shaw, 9 Allen, 516; Whitney *v.* Whitney, 45 N. H. 311.

[2] Rapallo, J., Matter of N. Y., Lackawanna and Western R. Co., 105 N. Y. 92.

dency is to lay hold of slight circumstances to vary the construction, and to give such effect to the language as the testator intended.[1] In one case E.[2] devised land to his three children, A., B., C.; "and his, her or their direct lineal descendants should he, she or they have any, in fee simple absolutely," subject to the conditions and contingencies following, "in the event that either * * shall die leaving no children or descendants of any children then, and in such case" the devise to the one so dying to go "to the children of the survivors or survivor * * equally, share and share alike, the direct lineal descendants, if any, of such of my said three children * * as may then be deceased to be entitled to the same share which the child or children so deceased would have entitled to if living." B. died and left three children. C. afterward died leaving no children. It was determined that the death mentioned was not a death during the lifetime of the testator, that the devise to C. gave a contingent estate in fee to him subject to be, and which was, reduced to a life estate by his death without children, or the descendants of any children, and on his death the fee passed to the children of A. and B. then living. Also, that the devise over was valid as a contingent limitation on a fee[3] and was not repugnant to the statutory provisions prohibiting the suspension of the power of alienation for more than two lives.

263. In Nellis *v.* Nellis[4] the testator devised to his two grandsons, A. and B., real estate in equal proportions. In the event of the death of either without issue the survivor was to take the whole. On his death, if without children, the estate was to go to the children of the tes-

[1] Vanderzee *v.* Slingerland, 103 N. Y. 47; Nellis *v.* Nellis, 99 Id. 505; Buel *v.* Southwick, 70 Id. 581; Hennessy *v.* Patterson, 85 Id. 91.

[2] Buel *v.* Southwick, 70 N. Y. 581.

[3] R. S. Part II, Ch. 1, Tit. 2, § 24.

[4] 99 N. Y. 505, 516.

tator's son C. By this will the two grandsons took a contingent estate in fee, subject to be reduced to a life estate by death without issue, and in the event of the death of both without issue the devise to the children of the testator's son C. would take effect and vest in them an absolute fee. This latter devise was valid as a contingent limitation on a fee. Said Justice Miller: "We think there was no unlawful suspension of the power of alienation by the devise in question. By the testator's death a contingent estate in fee vested in A. and B. which was liable to be reduced to a life estate; but at the same time the contingent interests of the other grand children living at the time, and to whom, upon the happening of the contingency, was devised the ultimate fee, also became vested in them. At the instant of the testator's death, these grandchildren became vested, under the will, with a right to the estate upon the happening of the contingency stated. They could unite with the first takers, at the time of the testator's death, in conveying an absolute fee in the estate devised. The devise in question would not, we think, let in after-born children of the testator's son C., and only those in being, at the time of the testator's death, were entitled to take."

264. If a primary gift has been made in violation of the statute and is void, another made on the same condition is not thereby accelerated. Said Justice Wright, in Rose *v.* Rose:[1] "If it be correct in this case, I cannot perceive why, in any case, where there are primary and secondary limitations depending on the same event, and the law adjudges the primary limitation to be void, the secondary bequest shall not be accelerated, and made to vest immediately. But I think it would be a new doctrine that when the secondary limitation, according to its own terms,

[1] 4 Abb. Ct. of App. Dec. 108, 116.

is more remote than the law will permit, it is brought forward if the vice of perpetuity, or some other vice, shall be fatal to and legally displace the prior limitation."

265. But when several estates for life have been created, the law[1] accelerates the period fixed by a deed or will for the vesting of the remainder in possession, and vests it immediately on the termination of the two estates for life which were first created. "The statute," says Justice Andrews, "so far over-rides the precise intention of the grantor or testator, as expressed in the will or deed, but as the possession in the remainderman was postponed, persumably for the purpose of allowing an intermediate life estate to run, and that purpose being defeated by section seventeen, the statute, by accelerating the remainder, gives effect as near as may be to the intention of the creator of the estate. But where the gift in remainder is upon a contingency which has not happened at the time of the death of the second life tenant, so that it cannot then be known who will be entitled in the remainder according to the terms of the instrument creating the estate, the statute, we conceive, can have no application."[2]

266. When a legacy is vested, and not contingent, its payment at a future day does not suspend the power of alienation. In Gilman *v.* Reddington,[3] Justice Comstock remarked, that if a vested pecuniary legacy payable without interest at a future day was held to create a suspension of absolute ownership, in the sense of the law against perpetuities, it would be necessary always to limit it in

[1] "Successive estates for life shall not be limited, unless to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created." R. S. Part II, Ch. 1, Tit. 2, § 17.

[2] Purdy *v.* Hayt, 92 N. Y. 446, 451.

[3] 24 N. Y. 18.

some form upon life. A vested legacy payable in three years or at any other period not depending on a life or two lives in being would, in that view of the subject, be void. Plainly such is not the rule of law.[1] Again, in Riker *v.* Society of the New York Hospital,[2] one of the legacies was made payable within four years after the death of the survivor of two sisters, and another legacy within two years from the death of a sister. Justice Macomber said: "In my judgment the legacies to charities in these wills are not invalid by reason of the directions there given that they should be paid within four years in one will, or within two years in the other, from the death of the survivor of the sisters respectively. As was held in Gilman *v.* Reddington, a vested legacy payable in three years, or at other periods depending on a life or two lives in being, is legal. The words prescribing the time within which the legacies should be paid are not, in their nature, in the way of any enlargement of the time, but are used by way of restriction. The title of the legatee to the legacy immediately attached upon the death of the testatrix."[3]

267. It is not always easy to determine whether a legacy has vested and the time of payment has been postponed, or whether the legacy is contingent. Justice Folger has remarked that when a gift is absolute, and the time of payment only is postponed, time constituting not an element of the gift, but relating simply to the payment, it

[1] A different rule had been announced in Converse *v.* Kellogg, 7 Barb. 596, but Finch, J., said in Bliven *v.* Seymour, 88 N. Y. 478, that whatever had been said in the Converse case which warrants an inference that such deferring of payment amounts to a suspension of the absolute ownership has no sanction in the decisions of the court, citing Everitt *v.* Everitt, 29 N. Y. 39, 72, and Gilman *v.* Reddington, 24, Id. 18.

[2] 66 How. Pr. 246, 251.

[3] Manice *v.* Manice, 43 N. Y. 382.

does not suspend the gift but defers the payment.[1] This doctrine has been uniformly accepted and applied.[2]

268. Thus, in Smith *v.* Edwards[3] the testator directed that thirty thousand dollars should be kept invested until his youngest grandchild born, or that might thereafter be born, before the final distribution of his estate, reached his majority. He authorized his executors, after five years, if they saw fit, to divide and distribute ten thousand dollars of the principal between four children and four grandchildren, and thereafter from time to time to divide and distribute other interest and increase among these beneficiaries; if either of them should die before payment leaving issue, the testator directed that his legacy, or portion, should go to his children; if either should die without issue, then his legacy or portion should go to the surviving brothers and sisters. When his youngest grandchild born, or that might within twenty years be born, should arrive at full age, or if a granddaughter should sooner be lawfully married, his executors were directed to divide the remaining twenty thousand dollars into two equal parts, one to be equally divided between his four children, the other equally between all his grandchildren then living, including those born after his death, with a similar provision in the event of a legatee's death as was attached to the ten thousand dollars. An application of this rule was decisive of the twenty thousand dollar bequest, which was to be paid at the period of final distribution to the testator's grandchildren who should be living at that date. Says Justice Finch:[4] "The condition of sur-

[1] Warner *v.* Durant, 76 N. Y. 136.

[2] Bliven *v.* Seymour, 88 N. Y. 469, 478; Tucker *v.* Bishop, 16 Id. 402; Paterson *v.* Ellis, 11 Wend. 259, 268–271; Delafield *v.* Shipman, 103 N. Y. 463, 467; Delaney *v.* McCormack, 88 Id. 174, 182, 183; In the Matter of Farmer's Estate, 6 Dem. 433; Hillyer *v.* Vandewater, 24 N. E. Rep. 999; Goebel *v.* Wolf, 113 N. Y. 405; Smith *v.* Edwards, 88 Id. 92.

[3] 88 N. Y. 92. [4] Id. 104.

vival attached to the gift itself, who the legatees would in fact prove to be, depended on a future contingency. Those who were to take in the prescribed event were uncertain until it happened; might not be any one of those *in esse* at the testator's death, and might prove to be a grandchild born twenty years later. The ultimate vesting of this portion of the principal was, therefore, plainly postponed for twenty years, and not during designated lives in being, and must be declared invalid."

269. Another noteworthy case is Everitt *v.* Everitt.[1] The testator directed that the residue of the estate and the accumulations should be held and used by the executors for the benefit of such of his three younger children as were living at the time of his death. If they were then twenty-one years of age the executors were to pay over the residue and accumulations of his estate to them, or to the survivors of them (if one should be dead) in equal proportions, share and share alike. If there was only one survivor of his three children, then the executors were to pay over the remainder and accumulations to him. The testator further directed that if he should die while any of his three younger children were minors, the executors were to hold and use the remainder of the trust funds above mentioned until they or their survivors should attain their majority, and then they were to pay over the residue and accumulations as already directed. Neither of the three children was twenty-one when the testator died. It was decided that the legatees were tenants in common, taking distributively and not jointly, and that their interest in the fund vested on the testator's death, but was not payable until the youngest became twenty-one. The court also decided that whether a valid trust had been created or not, the absolute ownership of the

[1] 29 N. Y. 39.

three shares of the residue had not been suspended beyond the life of the child to whom it had been given. On the death of the first of the three daughters who should die without issue, her share would go to the survivors absolutely; on the death of the second who should die without issue, her share would go to the survivor, and her part of the accrued portion, if not aliened, would go to her personal representatives, and thus would be withdrawn from the scope of the trust.

270. In Oxley *v.* Lane[1] legacies were given which were to be paid in twenty-five years, in the meantime the legatees were to have the use of them. These were vested in interest at the testator's death, and the time of payment simply was postponed.[2]

271. When a testator directs the conversion of his real estate into money, and then to distribute it, "the rule is settled that time is annexed to the substance of the gift and the vesting is postponed. Much more is that true where the gift is only to vest upon the happening of a future contingency until the occurrence of which it is uncertain whether a gift will be made at all."[3]

272. Of course, if the gift is contingent and the power of alienation is suspended, the gift is not invalid unless the suspension is for a longer period than is permitted by the law. If the gift shall vest within two lives its validity is not tainted with the vice of an excessive suspense of the power of alienation.

273. Nor does the non-existence of the legatee at the testator's death affect the legality of the suspense. If he

[1] 35 N. Y. 340.

[2] See Savage *v.* Burnham, 17 N. Y. 561; Beekman *v.* Bonsor, 23 Id. 317.

[3] Finch, J., in Delaney *v.* McCormack, 88 N. Y. 183, citing Warner *v.* Durant, 76 Id. 133; Smith *v.* Edwards, 88 Id. 92; Leake *v.* Robinson, 2 Mer. 387.

can be ascertained when the right to receive the legacy accrues the law is satisfied.[1]

274. When the life of a minor is to cover a part of the period of suspense, he need not be living at the beginning of the suspension. The law is observed if he is living at the end of the two designated lives to whom the estate is first limited. Says Justice Rapallo: "A remainder-in-fee in real estate, to take effect upon the termination of two lives in being at the time of the creation of the estate, may be limited to a person not in being at that time, * * and in such a case a further contingent remainder, in favor of a person not in being at the creation of the estate may be limited to take effect in the event that the person to whom the remainder is first limited shall die under the age of twenty-one years." In the same opinion he has further remarked that "there is no prohibition against the limitation of such estates to persons not in being. The requirement that the two lives, during which the suspension is allowed in all cases, should be those of persons in being at the time of the creation of the estate, is plainly expressed in the general provision. But the further suspension allowed by the exception is not stated to be upon any such condition. Such a restriction would be inconsistent with the purpose of the exception, and so limit its operation as to render it of but little avail."[2]

[1] Shipman *v.* Rollins, 98 N. Y. 311; Lefevre *v.* Lefevre, 59 Id. 434. Said Allen, J., in Holmes *v.* Mead, 52 Id. 343: "It is not material that the legatee should be definitely ascertained and known at the date of the will or even the death of the testator. It is sufficient if he is so described that he can be ascertained and known when the right to receive it accrues."

[2] Manice *v.* Manice, 43 N. Y. 374, 376. Elsewhere in the same opinion he has said: "Section 16 does not in terms require that the first remainder should be vested; it requires only that both remainders be in fee, so that within the period of a minority after two lives the estate shall vest absolutely in fee. * * A contingent remainder in fee may be limited on a prior remainder in fee, vested or contingent, provided one or the other of the remainders in fee must vest in possession at or before the expiration of the minority of the person first designated." Page 378.

SECTION II.

APPLICATION OF THE LAW IN NON-TENANCY IN COMMON CASES.

275. Such are the principles that have been established in applying the statute to suspensions created by contingent limitations. The cases in which it has been invoked to defeat gifts and devises will now be reviewed. They will be considered under three heads. The first of these are cases which relate to devises to persons who were not tenants in common. In Morris *v.* Porter[1] the testator gave the income of his real estate to his four children during their lives, and at their death he gave his estate to his grandchildren, share and share alike. His real estate was not to be sold while his children lived. The court held that neither the children nor grandchildren could make an effective conveyance, for the reason that it could not be ascertained until the death of the surviving child who would eventually take the estate. This case is especially instructive because it clearly illustrates the twofold nature of the suspension of the power of alienation. If an express term be created, then the trustees cannot alienate the trust-property for they are expressly forbidden; and if a contingent limitation be created the beneficiaries cannot alienate it, and whenever this continues

[1] 52 How. Pr. 1, 8.

beyond the statutory period it is invalid. In this case Justice Van Vorst did not say whether a trust-term had been created or not. The difficulties in the way of declaring a trust were clearly seen and described. But it was not necessary to decide that question "for in no event could an absolute conveyance in fee of the premises be made unless the grandchildren, the devisees of the [children] joined therein," and they could not.

276. In Woodruff *v.* Cook[1] the testator gave his farm to his wife during her life, and then to his daughter during her life, and, if leaving no children, her husband was to have the benefit of it during his life. This created an illegal suspense, but the devises to his wife and daughter were valid, Justice Balcom saying that "the statute only declares that every future 'estate shall be void in its creation,' which shall suspend the absolute power of alienation for a longer period than during the continuance of two lives in being at the creation of the estate. The 'future estate' that would suspend the power of alienating the farm for a longer period than that authorized is the one for life that the testator attempted to give to the husband of [his daughter] and that only was void."

277. In Wilson *v.* White[2] the testator gave the use of his farm to his son for life "and at his decease to be equally divided among his children, should he have any," but if not, then it was to be equally divided among the children of the testator's brothers and sisters. On his death the first limitation vested a remainder-in-fee in his son's children, and the second limitation was a good contingent remainder which, however, would be defeated if any of the children of the testator's son survived their father. "There was in this case no improper suspension of the power of alienation, as the property must in any

[1] 47 Barb. 304, 307, affd. 61 N. Y. 638.

[2] 109 N. Y. 59, 61.

event vest in possession in some of the designated remaindermen upon the" son's death. In Child *v.* Child[1] the testator also gave the income of his estate to his wife during her widowhood, and when this was terminated by death or marriage, a daughter was to receive one-quarter of the income during her life, and then her children were to receive the estate itself. If, however, she left no children, then this portion or quarter of the testator's estate was to be divided among his other children. This was an alternative remainder, but valid, for the alienation of the estate was suspended only during the lives of the widow and daughter.

278. In Brown *v.* Evans[2] a testator gave to his son and to his heirs and assigns all his property provided he ever had any heirs that should become twenty-one. If he never had such heirs then the property was to be divided equally between the children of his brothers and sisters. It was held (1) that the bequest to the son was not for life, but in fee of the testator's land and also of his personal property on condition; (2) that this was not a condition precedent, but a conditional limitation, the effect of which would be, not to suspend the vesting of the interest bequeathed, but to divest it and send the property over in the event of the non-fulfilment of the condition; (3) that the ultimate and absolute title could not be determined until it was known whether any children which the son might have would live to become twenty-one. "As he might have had any number of such children, the title to the property would be suspended, not only during his life, but during the lives of each one of such children who should die under the prescribed age, and until some one of them should attain that age." As the statute forbade the creation of such a limitation the estate in remainder was void.

[1] 1 N. Y. Legal Obs. 182. [2] 34 Barb. 594.

279. In Radley *v.* Kuhn[1] the trustee was to pay from the income of the real estate seven hundred dollars to each of the two grandsons of the testator when they became twenty-one. If either died before reaching that age, the survivor was to have the whole; and the trust was to continue until the testator's son became twenty-five, unless he died before that time. If he lived to that age he was to have the net income less the fourteen hundred dollars mentioned during life, and the will declared that "if he should die leaving any lawful children the said real estate * * is to become theirs in fee when they arrive at the age of twenty-one, and the same is devised accordingly." The meaning of the will was declared to be that when the son became twenty-one the trust was to cease, and that he took thereafter the income for life, charged with any portion of the legacies above mentioned that might remain unpaid, that the remainder-in-fee was devised to his children, if he had any, when they became twenty-one, and if he did not have any, the fee would vest in the heirs of the testator, and finally if the son's children did not live until they were twenty-one, the fee vested in their heirs and not in those of the testator, consequently there was no unlawful suspension of the power of alienation. Said Justice Rapallo:[2] "If [the son] should die without issue the fee would, on his death, vest in the heirs of the testator. If [the son] should have a child or children, it would vest absolutely in them and be alienable and descendible. It is well settled that where an estate in land is devised to an infant 'when he attains the age of twenty-one years,' his attaining that age is not a condition precedent. * * He takes a vested fee. A contingent remainder over may, under section sixteen, be limited on such a fee, to take effect in case of the first devisee dying before

[1] 97 N. Y. 26, 35.

[2] Id. 35.

twenty-one. Such contingent remainder over operates to reduce the absolute fee of the devisee first named to a determinable fee. But the condition on which the remainder over is to take effect is a condition subsequent. It does not prevent the vesting of the fee in the first devisee, but merely renders such fee defeasible by condition subsequent."[1] * * Such a contingent remainder over by rendering the fee first limited defeasible necessarily suspends the absolute power of alienation during the minority of the first remaindermen. But such suspension is expressly permitted as to real estate,[2] and is the only exception to the rule that the absolute power of alienation cannot be suspended longer than two lives in being. * * In such cases the suspension is not caused by the provision that the infant shall take, when he arrives at twenty-one, for, as has been seen, his estate vests at once, and only his possession is postponed. The suspension is caused wholly by the contingent limitation over in case he died before twenty-one. When, therefore, there is no such contingent limitation over, the devisee or devisees to whom the land is given 'when they become of age,' take an absolute and indefeasible fee, and, in case of their dying under age, the fee vests in their heirs and not in the heirs of the testator."

280. In Gott *v.* Cook[3] a testator gave the use of a house and lot to his brother's wife during her life or widowhood, and in the event of her death or marriage the use was given to his nieces until they were twenty years old, or should marry. It was conceded that the use of the house and lot passed directly to the beneficiary.

281. In Kiah *v.* Grenier[4] the testator directed that his estate, after the death of his son, should go to his heirs

[1] Manice *v.* Manice, 43 N. Y. 303, 380; Roome *v.* Phillips, 24 Id. 463.
[2] R. S. Part II, Ch. 1, Tit. 2, § 16.
[3] 7 Paige, 521. [4] 1 T. r. C. 388.

when of age, and if he died leaving no heirs or widow to the testator's niece. He also directed that if his son should die leaving a widow or heirs, she or they should have the use of the property during her widowhood and while the heirs should live, and that after her death or marriage and the death of the heirs, the property should go to the testator's niece. The suspension was for too many lives. Said Justice Potter: "Suspension of the power of alienation, or of absolute ownership, must be measured, not by periods of time, however long or short, but by the duration of the lives of two persons in being at the time of the creation of the estate or the death of the testator. Under the provisions above quoted, the heirs were yet to be born and, perhaps, of a woman not yet born, and, of course, cannot be mentioned."

282. In another case[1] a testator devised land to A. and B. and their heirs and assigns provided both became twenty-one, and to their survivor if only one reached that age. If both died leaving no children the land was to go to C. and his heirs and assigns. A. and B. took determinable estates in fee in their respective moieties of the land subject to be divested in favor of the survivor if either died under age, and in favor of C. if A. and B. should both die without leaving children.

283. In Kelso *v.* Lorillard[2] C. gave all her estate, real and personal, to her husband for life, and the remainder to her son if he should live until reaching twenty-one. If he should marry and die before that time leaving children, they were to inherit the estate. If he died sooner leaving no children, then the estate was given to her two sisters L. and E. If either of them died leaving no children, then the survivor took the whole, but if both died leaving children then the parent's share should go to her

[1] Maurice *v.* Graham, 8 Paige, 483. [2] 85 N. Y. 177.

child or children. If either should die leaving no child, the child or children of the one who died leaving a child or children should take the estate. The testatrix died the day after making the will, her husband soon afterward, and her son T. before reaching age and before marrying, and E. also before the son leaving no child. It was decided that the husband had an estate for life, the son a vested remainder-in-fee subject to be defeated by his death before attaining his majority unmarried and without issue, that each of the sisters took a remainder contingent on the death of the son before reaching his majority and surviving him, that on E.'s death, leaving no child, her interest ceased and that the estate of the other was thus enlarged so as to include the whole, and that on the son's death it ripened into a fee. As the estate absolutely vested on his death there was no unlawful suspension of the power of alienation, and it was simply suspended during the husband's lifetime and the son's minority.[1]

284. A testator devised his real and personal estate to his sister A. to be held by herself and her children forever with a devise over to the brothers and sisters of the testator in the event of A.'s death and of her children leaving no children. A. had a child. It was determined that she took a life estate and her child a vested remainder in fee subject to open and let in after-born children, but the limitation over after the death of her children without issue was void.[2]

[1] "The devise to the two sisters was of a future estate, where the person to whom and the event upon which it was limited to take effect were uncertain, and was therefore contingent." Miller, J., citing Moore *v.* Littel, 41 N. Y. 66; Sheridan *v.* House, 4 Keyes, 569; Woodgate *v.* Fleet, 44 N. Y. 1; Ham *v.* Van Orden, 84 Id. 257.

[2] Hannan *v.* Osborn, 4 Paige, 336.

SECTION III.

APPLICATION OF PRINCIPLES TO CASES OF TENANCY IN COMMON.

285. Passing now to the cases in which the beneficiaries have been tenants in common, that of Smith *v.* Edwards[1] will first be described. A testator gave to each of his grandchildren born within twenty years after his death and before the final settlement of his estate, the sum of one thousand dollars to be paid on his reaching full age if a grandson, or on her marriage if a granddaughter. These gifts did not create an illegal suspension. They were present gifts of separate and distinct portions of the testator's property which would necessarily take effect within the period of one life in being at the death of the testator. Their payment only was postponed until majority or marriage. "The child of a daughter must necessarily take during the life of its mother, and that of a son, if born after his decease is still regarded as living at the death of its father for the purpose of the vesting of the legacy."

286. In Kennedy *v.* Hoy[2] a testatrix directed her executor to apply the income of a portion of her estate to the

[1] 88 N. Y. 92, 110.

[2] 105 N. Y. 134.

support of W., one of her children, and his family during his life, and after his death to pay the income to his surviving children until they reached the age of twenty-one years when the principal was to be divided among them, share and share alike. If W. should die without leaving children, or all of them should die before attaining majority and without leaving issue, the testatrix directed a division of the property equally among her three surviving children and those of any deceased child. W. survived and had a wife and two children. The trust for W. was declared a separate trust and therefore did not violate the law regulating the suspension of alienation.[1]

287. In Cromwell *v.* Cromwell[2] the three sons to whom the property was given took the same as tenants in common for life with the benefit of survivorship if either died without issue, the issue surviving the parent taking his share. In this case, therefore, the suspension was for only one life. The testator's direction was to divide annually the profits of his estate equally among his children, or the survivor or survivors of those who died childless during life, share and share alike. And if either of his children die leaving children then the parents' share was to vest immediately in them.

288. In Pinckney *v.* Pinckney[3] the testator bequeathed his estate to his two sons, A. and B., "and their heirs" and the income therefrom was to be divided between them equally, share and share alike, and if either should die leaving no issue the survivor was to have the share of the other. The contingent limitation of the survivorship was valid and the legatees took a vested interest as tenants in common in the premises subject on the decease of either without issue to a limitation over to the survivor.

[1] Van Schuyver *v.* Mulford, 59 N. Y. 426.

[2] 2 Edw. Ch. 495.

[3] 1 Brad. 269.

289. In Arnold *v.* Gilbert[1] the rents of an estate after the death of the testator's wife were to be divided into equal sevenths. One of these was given to G. during life, or while she remained single. On her death or marriage the principal was to become a part of the residuary estate of the testator, which was to be divided into six parts for the testator's five sons and daughter. Three of the sons took their shares of G.'s seventh absolutely. The shares of G.'s seventh, belonging to the other two sons, D. and E., were put in trust for investment and the interest only was to be paid to them, respectively, during their lives, and the remainder to others. The vesting of the sevenths was not postponed beyond two lives, nor was the vesting of the sixths into which G.'s share was divided except to D. and E.

290. In Leavitt *v.* Walcott[2] the testator directed that the interest from his residuary estate should be paid during life in equal proportions to A. and B. On A.'s death his share was to be divided between C., D. and E., share and share alike, for life, and on B.'s death her share was to be divided in the same manner. On the death of all these beneficiaries the estate was to go to F. if he was twenty-one, if not, it was to be held for him until he had reached that age. It was decided that the gifts to A. and B. were valid, and as C., D. and E. were to receive the income "share and share alike for life," their gifts were in severalty, and therefore valid. But the disposition to F. would carry the suspension beyond two lives and was invalid. Notwithstanding the invalidity of the gift it was separated from the remainder of the trust, and that was sustained.

291. In Bingham *v.* Jones[3] the testator gave one-third

[1] 5 Barb. 190.

[2] 65 How. Pr. 51. See reasons for reversal in 95 N. Y. 212.

[3] 25 Hun, 6.

of his estate to his son for life, and on his death it was to be united with the other two-thirds, the interest on which was to be paid to his grandchildren, share and share alike. After their death the principal was to be divided among his great grandchildren, share and share alike. The gifts to the grandchildren were in severalty and consequently the power of alienation of this portion of the testator's estate was suspended for only one life, while the other third, in which his son had a life interest, was suspended for only two lives.[1]

292. In De Peyster *v.* Clendining[2] the testator directed that if any of his five children should die without issue, his share of the income from the estate should go to the survivors, but if the child who should die left issue, then they were to receive the share of the income formerly enjoyed by their parent during the life of the testator's widow; and after her death the principal, and also the principal of the share of either child who died leaving issue after the widow's death, was to go immediately to their issue. It was decided that the limitation over to the survivors and to their children was void, because it might suspend the ownership of the property beyond the legal limit.

293. In Morton *v.* Morton[3] a testator devised the income

[1] The court cited Savage *v.* Burnham, 17 N. Y. 561; Everitt *v.* Everitt, 29 Id. 39; Stevenson *v.* Lesley, 70 Id. 512; Monarque *v.* Monarque, 80 Id. 320.

[2] 8 Paige, 295, affd. 26 Wend. 21.

[3] 8 Barb. 18. "Where a legacy is given to a class of individuals, in general terms, as to the children of A., and no definite period is fixed for its payment, it will be considered as due at the death of the testator. And only such children as were either born or begotten at that time, are entitled to share in the legacy. But where there is a postponement of the division of the legacy, given to a class of individuals, to some period subsequent to the testator's death, every person who answers the description, so as to come within the class at the time appointed for the division, will be entitled to share, although not *in esse* at his death, unless the will discloses a different intention." Brown, J., in Morton *v.* Morton, 8 Barb. 21, cit-

of his real and personal estate to his wife during her life, and then it was to be equally divided between his two sons, A. and B. B.'s part was to be secured by mortgage and the interest was to be paid to him during life, and his wife was to have the interest afterward until his children became twenty-one. On the death of the testator's widow and of B. the estate became vested in the children. All of his children who were then living could share therein. Their mother's interest between the death of her husband and the attainment of their majority did not impair the validity of the trust. The right of property no longer depended on a contingency, but all the persons were in being who could by any possibility have an interest in the estate; and consequently the power to sell and convey was complete.

294. In Persons *v.* Snook' a testator directed his excutor to sell his personal estate and divide the same into eight shares, one of which was to be paid to his daughter R The interest on five shares was to be paid by the executor to five children of testator, each receiving the interest on a single share. Two shares were to be paid over to the heirs of two deceased daughters if living at the testator's death. If none were living, then he was to return these shares and pay the interest to the surviving children during their lives. On the death of a surviving child his share was to go to his heirs if having any. If not having any, then the use was to go to the other surviving children during their lives. It was contended that on the death of either of the surviving children without heirs, the share of which he had the use went directly to the testator's children. But the court decided that the intention of the testator was to give the survivors the use only of such share

ing Myers *v.* Myers, 2 McCord's Ch. 214, 256; Gilmore *v.* Severn, 1 Bro. C. C. 582 (506 Perkins, Ed.); Jenkins *v.* Freyer, 4 Paige, 47.

[1] 40 Barb. 144, 155.

during their lives equally. "As to the seven shares, therefore, it is manifest that nothing was given or intended to be given, to the five living children named, or any of them, except interest or use for life." The disposition of the property was directly within the prohibition of the statute. It was claimed that the grandchildren living at the testator's death took a vested interest in the share of their parents subject to open and let in after-born children. But the court said that this was not so. "Their interests were not vested, but contingent, and depended entirely upon the event of their surviving their parents. If they did not, the use of the share and the trust continued to other beneficiaries, and the absolute ownership would necessarily go to others. Whether it would ever vest in the grandchildren could not be determined until the death of the parents. The rule is, that if, according to the provisions of the will, such a suspension of absolute ownership may possibly happen, it renders the bequest void, the same as though the happening of such an event were inevitable."

295. "Where the precedent or particular estate is given to several persons as tenants in common, the remainders limited upon the estates of a part of the tenants in common may fail, without affecting the remainders limited upon the estate of the others."[1] And the principal has been so bent that if land is given to A. and B. for life, as tenants in common, with the right of survivorship, and afterward to C. for life, the illegal suspense of one share (which would be the share taken by the survivor), will not impair the validity of the other share, though it cannot be ascertained until the end of one life which share is unlawfully suspended. Thus, in Purdy *v.* Hayt a limitation was created for three lives of the share given to one of the two

[1] Andrews, J., in Purdy *v.* Hayt, 92 N. Y. 446, 457.

sisters of the testator, but on which share the limitation would operate, could not be known until one of the sisters should die. By that event the unlawful limitation in remainder would be determined. The question was raised whether the inability to ascertain which of the shares was lawfully suspended until one life estate was spent did not defeat the remainder. Justice Andrews, speaking for the court, answered: "We perceive no good reason why such a result would follow. The rule is well settled that where by the terms of the instrument creating an estate there may be an unlawful suspension of the power of alienation, the limitation is void, although it turns out by a subsequent event, as by the falling in of a life, no actual suspension beyond the prescribed period, would take place. But the rule relates to cases where, if the limitations take effect, in their order, as contemplated by the grantor or devisor, some of the estates limited will not vest within the prescribed period, and they are cut off as too remote, although it may happen that the estates so cut off, would, by events subsequently happening, take effect within two lives. The case here is not, we think, within the principle. In the one case the vice effects the whole limitation, and in the other the limitation of a part only of the property devised, the only uncertainty being as to the part the title of which will be unlawfully suspended, and this will be ascertained within the period of a single life." How would the courts sixty years ago have decided this question? The decision rests on secure ground, for the alienation of one portion of the estate could not possibly be suspended beyond two lives. It is true that not until the death of one of the sisters could it be known to what portion of the estate the power of alienation was legally suspended, and to what portion it was not. But the persons were in being and known who measured the suspense; and this was not

to continue beyond the legal requirement of two lives for one portion of the estate. Now let us apply this doctrine to the James will case: The estate was to be suspended until the youngest child and grandchild living at the death of the testator and attaining their majority should live until that time. Thus, a person from two classes was selected to measure the suspension. It was not known at the time of the testator's death which child and grandchild would determine the trust-period, but there were only two persons and they were in being when the testator died. Let us also keep before us a familiar principle that a limitation may be for a period less than life, majority, widowhood, or a fixed period even, ten years for example, if the person designated shall live so long. Life, or any period less than life, is the law. In the James case there were nine children and three grandchildren. Let us suppose that the five eldest attained their majority. The next event is the death of the first child. Then the fourth becomes of age. The second now dies, leaving the third as the term-measurer of that class. The oldest grandchild dies and the next attains his majority. The first then becomes the term-measurer of that class. By time and death both are now known who are to determine the duration of the trust. When they attain their majority it ceases, if they die sooner its duration is also at an end. Would the rule of suspension have been violated by adopting such a construction? Only two term-measures would have existed at any time; was the knowledge of the identity of the child and grandchild who were to serve in this capacity at the beginning of the trust-period essential? That one of each class would have thus served was as certain as his existence; what more does the law require? Suppose the testator had said that the trust should endure until the death of all the children and grandchildren; this doubt-

less would have been illegal; but suppose he had said that its duration should be measured by the life of the child and grandchild who died last; in truth its duration would have been measured by two lives, and does not the law permit this? Must the two be specifically designated? Of course, it will be admitted that the courts have thus construed the law, but surely the requirement is not contained in the statute itself. Justice Bronson contended in the James case that the trust might run through the twelve lives, and that the testator evidently intended that it should continue so long as any one of either class remained a minor. But suppose he did, do not trusts in many cases run through the lives of several beneficiaries? Suppose the testator had said that the trust should continue so long as his son John lived, and that he had outlived the others, would not the trust have been valid? The fact that the trust runs through other lives while running during the one or two designated lives is a mere coincidence, and has no significance. Finally, would not the law be observed if a trust or an estate was so constructed that the power of alienation could not possibly exceed two lives who should be in existence when the testator died, though their identity would not be known until the death of one or both. If the fact must surely be known then, why would not the intent of the law, and the interests of all concerned be as effectually regarded as by knowing who are the term-measurers, or other persons who are to determine the period of suspension, in the beginning?

SECTION IV.

CONTINGENT LIMITATIONS OF PERSONAL PROPERTY.

296. With respect to contingent limitations of personal property the principal cases will now be considered. In one of them[1] the interest of one thousand dollars was to be paid to three persons, so long as either lived. This clearly was an excessive suspension. In another,[2] the devise was limited to three minorities and was void, "carrying with it all subsequent and dependent limitations." In Tayloe *v.* Gould[3] a testator gave an estate to his wife for life, and then to his daughter and her children who should attain their majority, his real and personal estate. This was an invalid suspension, for as the daughter had five children the suspension was for seven lives.

297. In Strang *v.* Strang[4] a testator gave to D. the use of ten thousand dollars and his heirs and assigns were to have the remainder. C. was to have the previous use

[1] Banks *v.* Phelan, 4 Barb. 80.
[2] Estate of Thomas, Tucker, 367.
[3] 10 Barb. 388.
[4] 4 Red. 376.

of four-fifths of this sum, and if she outlived A. and B. the use of two thousand dollars more, which was a part of a bequest of five thousand dollars, the income of which A. and B. were to have during their lives. B. died on the testator's funeral day. The bequest of the ten thousand dollars to D. was void with respect to the two thousand dollar portion because the title thereto was illegally suspended.

298. If a testator should give several life estates, and then make a gift to A., for example, payable when she reached twenty-one, notwithstanding all gifts to the contrary, the gift to A. would be sustained. In Jansen *v.* Cairnes[1] the gift was payable as soon as A. became twenty-one notwithstanding the successive life estates the testator created. The chancellor remarked that "the giving of the legacy to her, therefore, could by no possibility suspend the absolute ownership of that part of the testator's property beyond her life which was in being at the death of the testator."

299. A testator gave the shares into which his personal estate was divided to his sons and their descendants, but if they died before the property was vested in them, then he gave it to his father if living, if not, to his uncle if living, if not, then to the uncle's male heirs. "This limitation over, by its very terms, could not take effect until after the expiration of three lives in being at the death of the testator, and was therefore void."[2]

300. In Burrill *v.* Sheil[3] the interest on money was to be paid to A. semi-annually during her life, and then to B. during her life, and at her death the money itself was given to B.'s issue, share and share alike, to be at their own disposal as soon as they should respectively become twenty-five. Until then the interest was to be paid to

[1] 3 Barb. Ch. 350, 356.

[2] Thompson *v.* Thompson, 28 Barb. 432. [3] 2 Barb. 457.

them in equal proportions. If B. died before A. then the money was to be divided at A.'s death among B.'s issue as above mentioned. The limitations or gifts to A. and B. were valid, and so were those to B.'s issue. Said Justice Edwards: "It is a well settled rule in equity that where a legacy is given to a person to be paid at a particular age, or at the end of a fixed term, he takes a vested interest.[1] And even when there was a bequest to a person when he should have attained the age of twenty-five, and the testator empowered his executors and trustees to place the money at interest, which interest he directed to be applied at their discretion for the education of the legatees, it was held that he took a vested interest. And the court considered the disposition of the interest to be an indication of the testator's intention that the legatee should, at all events, have the principal.[2] In the case now under consideration the principal is given to the surviving issue of B. immediately on her death, to be at their own disposal as soon as they shall respectively attain the age of twenty-five years; and until that age the executors and trustees are authorized to pay over the interest to the said issue. The words 'to be at their own disposal,' taken in connection with the disposition of the interest, would, according to the above decisions, confer on the surviving issue a vested interest on the death of B., or, in case of her death before A., on the death of A. And there is no suspension of the power of alienation beyond the two lives of A. and B."

301. In Beardsley *v.* Hotchkiss[3] the testatrix bequeathed her personal property to her children with the proviso

[1] Jackson *v.* Jackson, 1 Ves. Sen. 217; Walcott *v.* Hall, 2 Brown, C. C. 306; Bolger *v.* Mackell, 5 Ves. Jr., 509.

[2] Fonereau *v.* Fonereau, 3 Atk. 645; Hoath *v.* Hoath, 2 Brown, C. C. 4; Hanson *v.* Graham, 6 Ves. Jr., 239.

[3] 96 N. Y. 201, 213.

that if any should die before attaining majority and without leaving issue, the share of such an one was bequeathed to the surviving children. This devise did not offend against the statute, for the share of any child without leaving issue was given absolutely to the survivors and vested in them free from contingencies. "Upon the death of the mother the share of each child vested, subject to be defeated by death without living issue during minority."

302. In Richards *v.* Moore[1] the testator bequeathed the net income of his personal property to his wife for life and afterward to his children in equal shares during their lives, and after their death the principal was to be divided among his grandchildren. This created an unlawful suspension. In Thompson *v.* Clendening[2] a testator gave his personal estate to his wife and four children, and others which he might have by her, which was to be distributed among them equally at the time of the sale and distribution of his real estate. This created an illegal suspension.

303. In DuBois *v.* Ray[3] the testator gave his estate to his two daughters and their issue, but if he had no lineal descendants, then his estate was to go to the children whom his brother and sister might "leave." One of his daughters died soon after himself leaving no children, and assuming, as was done, that the other would also die childless, the question arose concerning the right of the children of the brother and sister of the testator to take the property. It was contended that the power to suspend the alienation of the property was exhausted by the lives of the testator's daughters, and that as no one could know until the death of the brother and sister how many children they would leave, the power of alienation would be suspended for four lives. The court, however, con-

[1] 5 Red. 278. [2] 1 Sand. Ch. 387. [3] 35 N. Y. 162.

strued the word "leave" to be "have," and by this construction the children of the brother and sister took a vested remainder at the death of the testator of which they would be divested if either of the daughters died leaving lawful issue. By this construction there was no improper suspension.

304. In De Barante *v.* Gott[1] the trust-maker gave to his sister the use of his house during her widowhood. If she died or married before her two daughters married or became twenty-one, they, or the survivors of them, was to have the use of the house. The will further provided: "In case of the death of both of my said nieces, and only one of them shall have lawful issue, I then give, devise and bequeath unto such child or children the whole of my estate, both real and personal, and I hereby require and direct my said executors, if such child or children shall be under the age or ages above mentioned, to apply so much of my estate as may be necessary for their support, maintenance and education, and until the youngest of such children shall become of age, to pay to such as shall have become of age an equal share of the income of my estate and then to assign or transfer unto such child or children all the money then on hand, and also all the stocks and securities in which any part of my estate may be invested; and also to release unto such child or children my real estate to which my said executors may have acquired title in the management of my estate or otherwise, in trust for the devisees, * * whether named or not." The testator's sister took a life estate in the house and each daughter a contingent remainder for life in one-half. The contingency having happened, namely, the death of their mother before they were both married or became twenty-one, their life estate vested.

[1] 6 Barb. 492.

But the disposition which the will made of the remainder after their death was contrary to the statute relating to perpetuities and was void.

305. A contingent remainder may be limited on a term of years provided it must vest in interest, if ever, at the end of two lives in being. In Butler *v.* Butler[1] the testator directed the trustee to invest one-fourth of his estate and to pay the income to the wife of the testator's grandson until his eldest child became of age, when the estate was to be divided equally among all of the grandchildren and paid over to them on attaining their majority. The oldest child was nine years old when the testator died. The chancellor declared that the remainder to the children was contingent, and was also limited on a term of years, for the mother's estate was to continue for twelve years if the eldest child lived until she was twenty-one. "But a contingent remainder may be limited upon a term of years, provided the nature of the contingency on which it is limited is such that the remainder must vest in interest, if ever, during the continuance of not more than two lives in being at the time of the creation of such remainder, or at the termination of not more than two lives thus in being. Here the contingent remainder is so limited that it must vest in interest, if ever, during the continuance of one life in being at the death of the testator. * * For the contingent remainder, to the oldest child of Mrs. B. at the death of the testator, and to the other children who are to share in the ultimate remainder-in-fee of this fourth of the testator's estate upon the happening of the contingency contemplated by him in his will is so limited that it must take effect, if ever, during the continuance of the life of such eldest child. The absolute ownship of the fund, therefore, could not

[1] 3 Barb. Ch. 304, 310. See contrary decision in Hoff. Ch. 343.

be suspended by this contingent limitation, beyond the continuance of two lives in being at the death of the testator." The vice chancellor disregarded the widow's interest entirely in construing the will, nor can we perceive the importance of regarding it, as the remainders were limited on the life of the eldest child. But the chancellor's point is worthy of notice, like every other emanating from such a high source.

306. On several occasions attempts have been made to cut off excessive estates by operation of the seventeenth and nineteenth sections of the statute. Thus in Amory *v.* Lord[1] the testator created a trust whereby the income of his property was given, first, to his wife, and, second, to his children as tenants in common, and, third, to the husbands and wives of the children, before the fee could vest in the grandchildren. An attempt was made to save the trust by limiting its duration to the lives of the children. Such a limitation would have been valid as they were tenants in common, for the suspension of each portion would have been for only two lives, those of the mother and of the child who held the same. Sections seventeen and nineteen were employed to effect this limitation. But the court of appeals clearly showed that it did not apply to such a case. By a similar application of the rule of suspension the whole trust would have been smitten. By an application of sections seventeen and nineteen a part of the trust would have been destroyed; and by the application of section fourteen the whole would have been. Surely such a clash was never intended. How then are these statutes to be regarded? The court, speaking through Justice Taggart, developed a harmonious system, though the explanation might have been more luminous. Sections seventeen and nineteen

[1] 9 N. Y. 403.

do not apply to estates that are under the control of trusts and in which the power of alienation is consequently suspended, but to life estates that are vested. When however, these exceed two, the others are cut off, and the remaindermen come into possession of their estate immediately on the death of the persons holding the first life estate.[1]

307. In construing the seventeenth section Justice Andrews has remarked:[2] "The prohibition against the creation of more than two successive estates in the same property has no necessary connection with the law of perpetuities. There is no suspense of the power of alienation of land by the creation of successive life estates therein unless they are contingent. Any number of successive vested life estates may be created without violating the statute of perpetuities. The prohibition against creating more than two successive life estates in the same property applies to such estates, whether vested or contingent. The policy of the prohibition, where applied to vested and therefore alienable interests, need not be considered. It is sufficient to say that it was regarded by the legislature as not imposing an undue restraint upon the owner of property, and the pro-

[1] Woodruff *v.* Cook, 61 N. Y. 638. "In order to give effect to §§ 14, 15, 17 and 19, and each of them, we must adopt the following hypothesis, viz: where the absolute power of alienation is suspended for a longer period than two lives in being at the creation of the estate, the whole estate is void in its creation, so that not only the third life estate and the remainder, but the prior life estates are void. But where the absolute power of alienation shall not be suspended, although more than two successive life estates are created, the first two life estates and the remainder are valid estates under the provisions of §§ 17 and 19, but the third life estate is void, and the remainder must take effect immediately. In one case, the estates attempted to be created are vested estates, and the persons in whom they are vested may convey an absolute fee in possession. In the other, the estates are contingent, and do not vest until the happening of the event upon which the estate depends." Taggart, J., Amory *v.* Lord, 9 N. Y. 419.

[2] Purdy *v.* Hayt, 92 N. Y. 451.

vision is in harmony with the general rule, prescribing the period during which the power of alienation of land may be suspended, viz: two lives in being at the creation of the estate. The statute, however, does not avoid the whole limitation where more that two successive life estates are limited. It permits the first two to take effect, avoiding those only which are in excess of the permitted number. So also the seventeenth section preserves a remainder limited on more than two successive estates for life. But we apprehend that the section must be construed as referring to vested, and not to contingent remainders. It cannot in reason, or by its true construction, be held to apply to the latter."

308. When a fee in land has been given can the testator restrict its alienation? Is not the restriction repugnant to the gift and therefore void. Surely a perpetual and total restriction of the power of alienation would be.[1] And even lesser restrictions have been considered invalid.[2] But we perceive no reason why a bequest cannot be qualified. The testator can do what he pleases with his own within the rules of law. Nor do we perceive any force in the argument that a restriction is void for repugnancy. The portions of a will containing the gift and restriction are to be considered together, the latter qualifying the other. Of course, restrictions must not go beyond the statutory rule regulating the period of suspension.[3] But so long as this is observed, we perceive no reason why they cannot be made. In Oxley *v.* Lane they were not valid because they offended against the rule.

[1] Oxley *v.* Lane, 35 N. Y. 346; Newkerk *v.* Newkerk, 2 Caines, 345; Newton *v.* Reid, 4 Sim. 141; Schermerhorn *v.* Negus, 1 Denio, 448; DePeyster *v.* Michael, 6 N. Y. 467, 492.

[2] 4 Kent, 131; De Peyster *v.* Michael, 6 N. Y. 467; Roosevelt *v.* Thurman, 1 Johns. Ch. 220.

[3] Oxley *v.* Lane, 35 N. Y. 346, 347.

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